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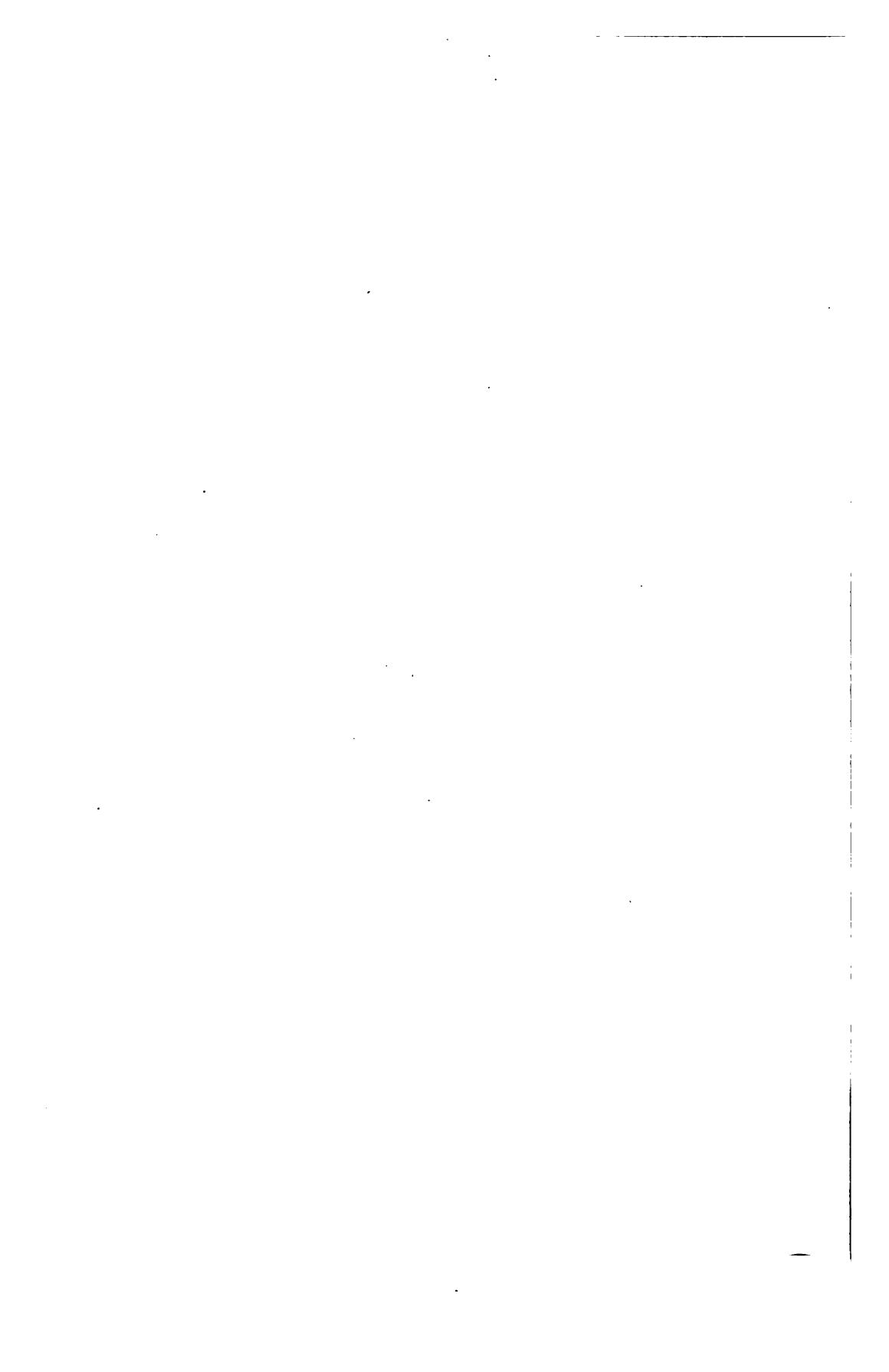


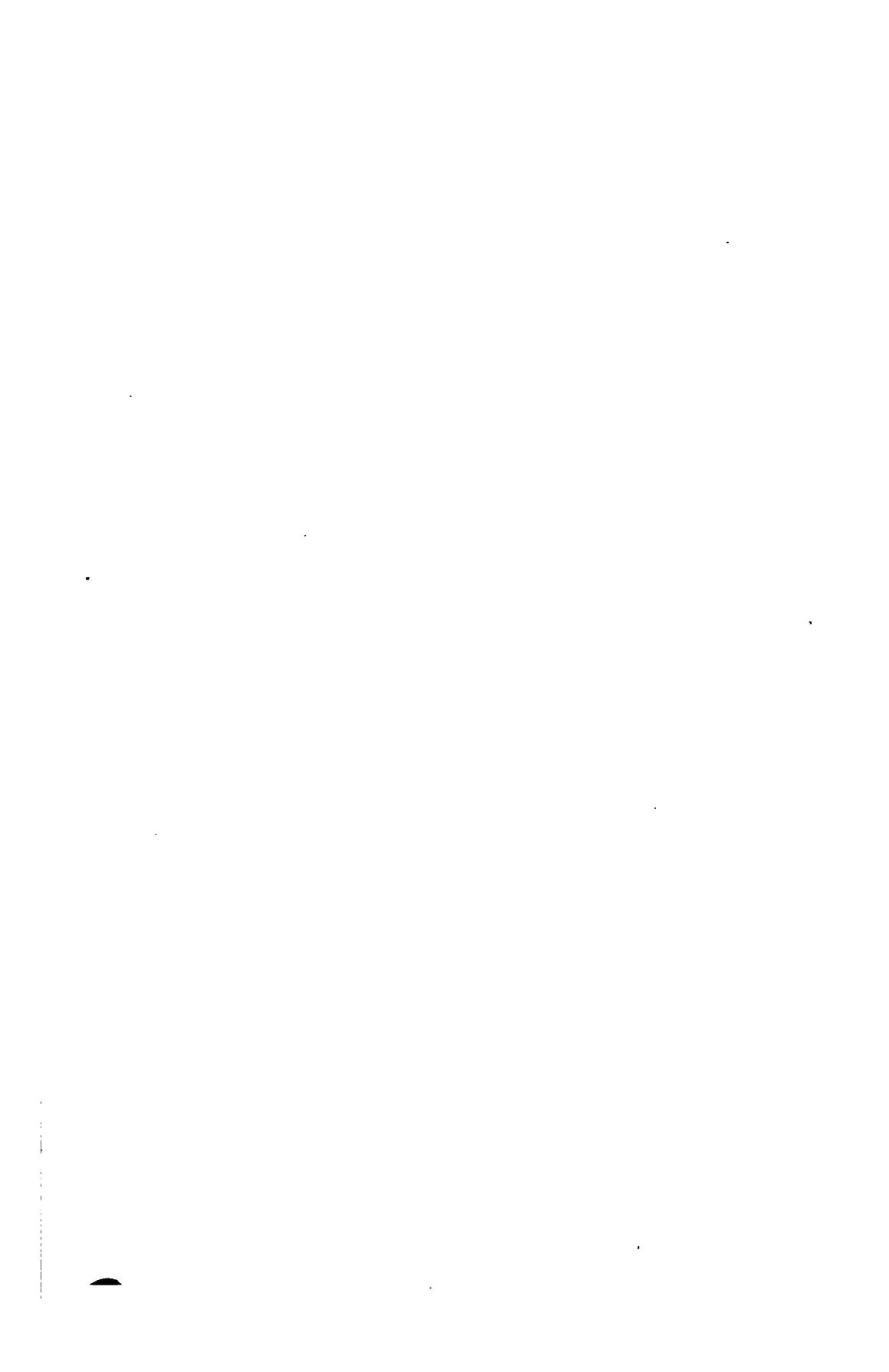
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v. 3







REPORTS OF CASES

ARGUED AND DETERMINED

1857

IN THE

Supreme Court of New South Wales,

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS,

AND

AN APPENDIX

CONTAINING DECISIONS BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL FROM APPEAL, AND A SELECTION FROM THE FORMER DECISIONS OF THE COURT.

BY

W. H. WILKINSON, Esq., AND WILLIAM OWEN, Esq.,

BARRISTERS AT LAW.

VOL. III.

SYDNEY:

J. J. MOORE, BOOKSELLER AND PUBLISHER,
GEORGE STREET, OPPOSITE ST. ANDREW'S CATHEDRAL.

1865.

我國的民族問題，是中國人民民主統一戰線的一個重要問題。

224515

Final Review

JUDGES
OF THE
SUPREME COURT OF NEW SOUTH WALES

DURING THE PERIOD COMPRISED IN THIS VOLUME.

SIR ALFRED STEPHEN, Knt., C.B., Chief Justice.
SAMUEL FREDERICK MILFORD, Esq.
EDWARD WISE, Esq.

PRIMARY JUDGE IN EQUITY.
SAMUEL FREDERICK MILFORD, Esq.

ATTORNEY GENERAL,
JAMES MARTIN, Esq.

SOLICITOR GENERAL,
P. FAUCETT, Esq.

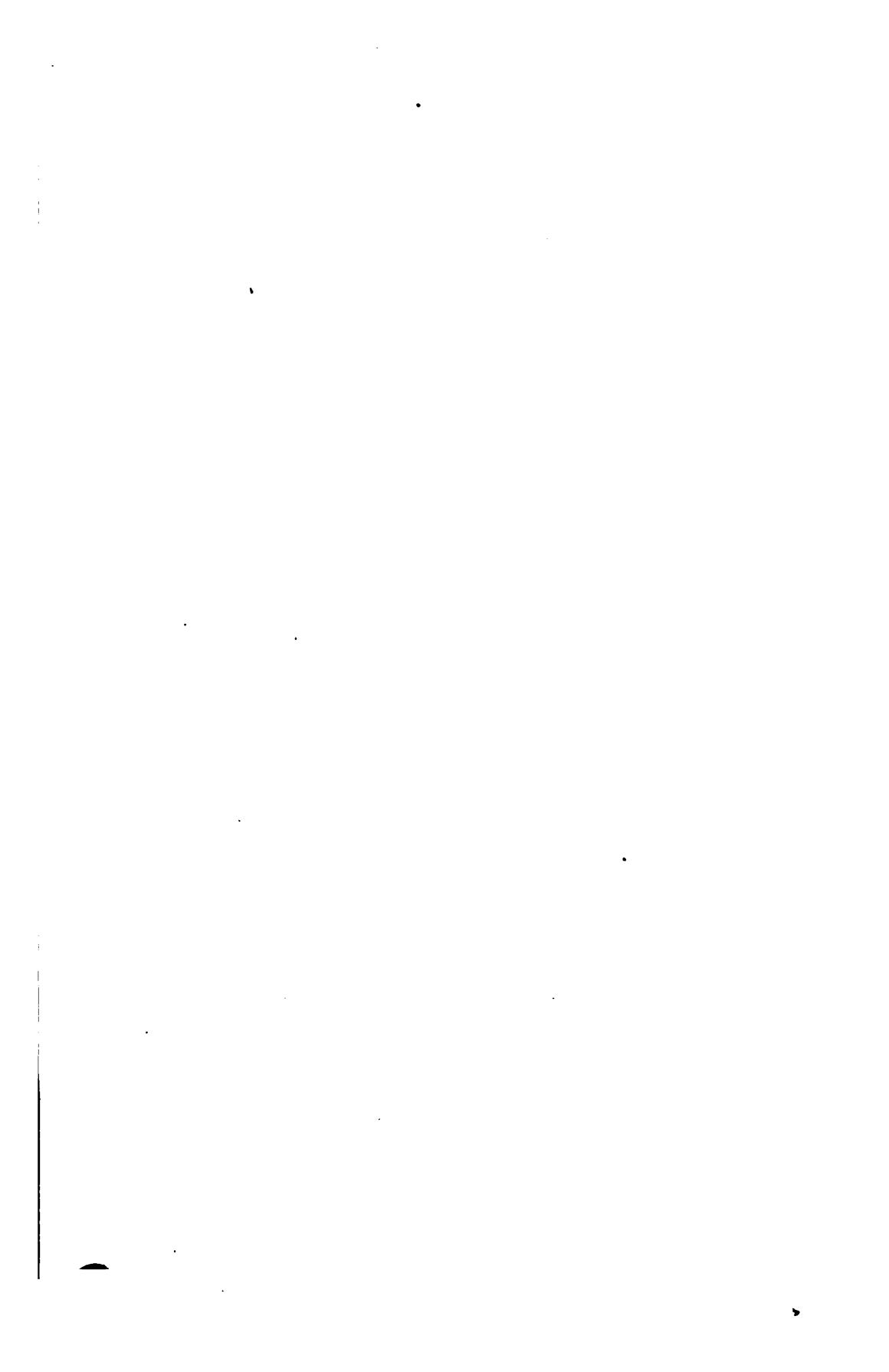


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IN
THE SUPREME COURT
OF
NEW SOUTH WALES,
AT LAW.

1864.

MATTHEWS *against* OGG.

December 1,
1863.
March 22,
1864.

TRESPASS for seizing and carrying away certain goods of the plaintiff. There was a count in trover, and a count for money had and received. Pleas—not guilty, not possessed, and never indebted.

At the trial before *Wise*, J., in the November sittings, 1863, it appeared that the action was brought for seizing and selling certain goods of the plaintiff under a writ of *fi. fa.*, against one *Smith*. The present defendant was the plaintiff in that action. He had been living in Maitland where *Smith*'s liability had been incurred; but he for some months had been residing in Queensland. He had left his books with one *Brown* to collect his debts; and *Brown* had instructed the attorney to proceed against *Smith*. The attorney commenced an action and obtained judgment. He then issued this writ of *fi. fa.*, which was endorsed to levy £104 4s. 2d., and got it directed to a special bailiff under 7 Vic. No. 13,

Where a writ of *fi. fa.* is sued out by an attorney, and directed to a special bailiff under 7 Vic., No. 13, s. 2, the client is responsible for acts done by the bailiff, in respect of or by color of the process; and he is equally liable if the attorney is employed by some one on his behalf without his knowledge, and he afterwards ratifies the employment.

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sect. 2. The attorney afterwards instructed the bailiff to follow two carts loaded with goods for *Smith* and the plaintiff (*Matthews*), and the bailiff accordingly seized the drays, and ultimately sold all the goods, without distinction, which were on the drays, and paid the proceeds, namely, £291 17s. over to the attorney. It appeared that goods belonging to the plaintiff were on one of the drays, with goods belonging to *Smith*. It was for this seizure and sale that the action was brought. Some correspondence between the defendant and the attorney tended to show that he ratified and adopted the appointment of the attorney by *Brown*, but in ignorance of what had been done by the special bailiff.

The jury found a verdict for the plaintiff with £79 10s. damages, and stated that they thought that the defendant ratified *Brown's* act in placing the matter in a solicitor's hands, but that there was no evidence of his ratifying the improper act of the bailiff.

Upon this finding the learned Judge directed the verdict for the plaintiff, on the ground that the defendant was liable—first, by the employment of the attorney, and secondly, by virtue of the statute, 7 Vic., No. 13.

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Darley, for the defendant, obtained a rule *nisi* to set aside the verdict and enter it for the defendant, on the ground that his approval of the appointment and employment of the attorney was not equivalent to an approval or adoption of the acts of trespass, of the commission of which the defendant was ignorant; and on the ground also that he did not adopt or ratify the suing out of the writ of *fi. fa.*, but only the bringing the action.

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The *Solicitor General* (*Pell* with him) showed cause. The defendant having ratified the employment of the attorney must be taken to have ratified the suing out the writ of *fi. fa.*, and the acts done in executing the writ. It is clear that the client is responsible for the acts of the attorney, until he has sued out execution;

Savory v. Chapman (a). *Parsons v. Lloyd (b),* where the plaintiff who had been arrested under process afterwards set aside for irregularity, brought trespass against the execution creditor for the false imprisonment, Lord Chief Justice *De Grey* says, "this action well lies against *Lloyd*, the party himself who sued out this void writ, as is clear from *Turner v. Selgate (c)* and many others which might be cited; and to say now that this action does not lie against the party himself would be *quieta movere*." So in *Barker v. Braham (d)*, it was never suggested that the execution creditor was not liable. *De Grey*, C. J., in delivering the judgment of the Court, says, "who ever procures, commands, assists, assents, &c., is a trespasser; here the client commands the attorney, the attorney actually commands the sheriff's officer; the real commander is the attorney, the nominal commander is the plaintiff in the action—so attorney and client are both principals;" and in *Bates v. Pilling (e)*, where an attorney at the instance of a creditor sued out process against a debtor in the County Court, and the attorney's agent, after the debtor paid the debt and costs, but not knowing of such payment, signed judgment and sued out execution under which the debtors goods were seized, it was held that both the creditor and his attorney were liable as trespassers to the debtor. In *Farmain v. Hooper (f)*, which was an action of trespass against the sheriff, and *A.*, it appeared that *A.* had obtained judgment against *Joseph Farmain*, who was the son of the plaintiff, and thereupon issued a *fi. fa.* against *Joseph Farmain*, without any further description, under which the goods of *Joseph Farmain* the elder were taken; and it was held that the writ afforded no justification to the sheriff, and that *A.* was also liable in trespass, although he was not proved to have in any way interfered beyond giving instructions to the attorney to sue *Joseph Farmain*, the son. Under the 7 Vic., No. 13, sect. 2 (a), the

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(a) 11 A. & E. 836. (b) 3 Wils. 841; S. C., 2 W. Bl. 845.
 (c) 1 Lev. 95; 1 Sid. 272.
 (d) 3 Wils. 868; S. C., 2 W. Bl. 866.
 (e) 4 B. & C. 88. (f) 6 M & G. 827.

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plaintiff has a remedy against the party suing out the process, as before the statute he would have had against the sheriff, in case the acts complained of were done "under or in respect of such process, or by color thereof." As therefore the defendant having in his hands the writ against the goods of *Smith*, seized the goods of *Matthews*, he must take the consequences of his mistake—the seizure being manifestly under or in respect of or by color of the process.

Sir *W. Manning*, Q.C., and *Darley* contra. The ratification ought to have been of the wrongful act itself, or at all events after knowing of such an act. The ratification of the appointment of the attorney does not involve the ratification of the unlawful act of the special bailiff, of which he knew nothing. The *Eastern Counties Railway Co. v. Broom* (*b*) shows that to render the principal liable, it must appear that he was fully aware of the act intended to be ratified. [*Wise*, J. In *Freeman v. Rosher* (*c*), it is laid down that the principal is liable if he ratifies with knowledge of the circumstances, or "if he means to take upon himself without enquiry the risk of any irregularity which may have been committed, and to adopt all the acts of the agent. The latter alternative is equivalent to ratifying with knowledge, because the intention to adopt the act at all events is the same as adopting with knowledge."] The defendant could not be deemed the party suing out the process for the purpose of the statute, unless he actually was so at the moment of its issue; but at the time when this process was sued out he did not know of it, and he

(*a*) That section, after empowering any Judge of the Supreme Court to name and appoint a person other than the sheriff, to whom the process of the Court shall be directed, enacts that "the sheriff (although the same may be in fact directed to himself) shall not be responsible for any act done under or in respect of such process, or by color thereof, but the persons aggrieved by any such act shall have the same remedy and right of action against the person to whom the process was directed, or the person appointed to execute the same (as the case may have been), or against the party suing out the process, or both (separately or jointly) as the person aggrieved would have had against the sheriff, in case such process had been directed to that officer, and the acts complained of had been done by him."

(*b*) 6 Exch. 314

(*c*) 13 Q. B. 780.

might then have disclaimed the employment of the attorney, and the act was not either done in respect or by color of the process.

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STEPHEN, C. J. The defendant having ratified the employment of the attorney by *Brown*, it is the same thing as if the defendant had employed him in the first instance to bring the action ; but if the attorney was employed for that purpose, he had authority without any new retainer to sue out execution. The writ was a proper one, and if it had been executed under similar circumstances by the sheriff, that officer would alone have been liable, for he was authorized only to take the goods of *Smith*. But the 7 Vic., No. 13, sect. 2, (a), in case where the writ is directed to or appointed to be executed by the special bailiff, substitutes the liability of the party "suing out the process" for that of the sheriff. Then who was the party suing out the process? Practically, the attorney. But who was his employer? *Brown*. And *Brown* alone would have remained liable, had his act not been ratified, although done for the benefit or on behalf of the now defendant. But the latter having recognized and ratified *Brown's* act in so employing the attorney—such ratification being equivalent to a previous command, the process was virtually sued out by the defendant himself, the plaintiff in that suit. Then the statute steps in and makes the defendant responsible for all acts done by the special bailiff, howsoever illegal, "in respect of or by color of the process." And the wrong seizure here was clearly an act of that character.

MILFORD, J., and WISE, J., concurred (b).

Rule discharged.

(a) See note (a), p. 3.

(b) See *Collett v. Foster*, 26 L. J. Ex. 412.

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March 28. WILLIAM SMITH and HENRY MATTHEWS *against*
EDWARD OGG.

In an action by A. and B., for seizing and selling the joint property of A. and B. under a *fi. fa.* only, held that the action was rightly brought in the joint names of A. and B.

THE declaration stated that the defendant had sued out a writ of *fi. fa.* founded on a judgment obtained by him against the goods of one *William Smith*, to levy £124 4s. 2d., besides poundage, &c., and that the writ was delivered to one *Walter Smith*, "to be executed by him as a special bailiff appointed for that purpose by his Honor the Chief Justice, &c., according to the statute, &c., and thereupon it became and was the duty of the defendant to take due and proper care that

the first count was for breach of duty, and alleged that the defendant had sued out a writ of *fi. fa.* against A., and that the writ was delivered to S. to be executed by him as special bailiff under 7 Vic., No. 18; and that the special bailiff under color of the writ, seized and sold the goods of A. and B., and delivered them to the purchasers; and also sold them under their value, and also seized and sold more than was necessary to satisfy the writ. The second count was for money had and received.

the writ should be in all respects legally and properly executed. Breach, that the defendant wrongfully and unlawfully caused to be levied and taken in execution under color of the writ, certain goods and chattels being the joint property of the plaintiffs, and sold the same, and the whole interests of the plaintiffs herein, instead of the individual interest of *William Smith* in the goods and chattels, and delivered the goods and chattels so sold to the respective purchasers thereof." A second breach alleged a seizure under color, &c., of the plaintiffs "of much greater value than was sufficient to satisfy the writ and expenses, to wit, &c." A third breach alleged that he caused a sale under color, &c., of more of the goods than was necessary to satisfy the writ and expenses, "to wit, the whole of the goods so levied and taken in execution, and therewith caused to be levied a much greater sum than was sufficient to pay and satisfy the writ and expenses, to wit, the sum of £300." A fourth breach alleged that the defendant caused a sale of the goods for a much less sum, &c.,

The defendant pleaded not guilty, and not possessed to the first count, and never indebted to the common count, except as to £157 6s. 10d., and as to that amount, paid that amount into Court. The plaintiff joined issue on the first three pleas and replied to the fourth plea, taking £157 6s. 10d. out of Court in discharge of the causes of action to which it was paid in. Held that by taking out of Court the money paid in under the money count, the plaintiff waived the tort, and could not, therefore, recover on the first count.

to wit, &c., than the same were really worth, and for which they ought to have been sold for, and converted and disposed of the money arising from the sale to his own use, by means whereof, &c. There were also counts for money had and received, and on account stated.

Pleas to the first count, not guilty, and not possessed; and a third plea, except as to so much of the second count of the declaration as claims £157 6s. 10d., never indebted; and a fourth plea as to so much of that count as claims £157 6s. 10d., payment into court of that sum, and averment that the sum "is enough to satisfy the claim of the plaintiffs in respect of the matter herein pleaded to."

The plaintiff took issue on the first, second, and third pleas, and replied to the fourth plea, taking the £157 6s. 10d. out of Court "in satisfaction and discharge of the causes of action in respect of which it has been paid in." Issue thereon.

At the trial before *Wise*, J., in November, 1863, it appeared that the defendant had recovered a judgment, and sued out a writ of *fi. fa.* against *William Smith*, and that the writ had been directed to one *Walter Smith* as special bailiff, under 7 Vic. No. 13, sect. 2. The bailiff seized goods which were proved to be the joint property of *William Smith* and *Henry Matthews*, and also goods the property of *Henry Matthews* alone (a). He then proceeded to sell by auction, and did sell the whole goods, not only *Smith's* partnership interest in them, and delivered them to the different purchasers. The proceeds of the sale amounted to £291 7s. 6d. It was for the seizure and sale of these partnership goods that the present action was brought. The above facts having been proved, the learned Judge enquired of the Solicitor General, who appeared for the plaintiffs, how they could maintain the action on the first count, which was for a breach of duty, and complained of the sale as a tort, when they had taken out of the Court the money paid in by the defendant under the second count, which

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(a) See last case.

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treated the same sale as legal, and complained of the defendant keeping in his hands the proceeds of such sale. After argument, the learned Judge directed a nonsuit, holding that the plaintiffs, by taking out of the Court the £157 6s. 10d. paid in by the defendant, had thereby recognised the sale and waived the tort entirely, and reserved leave to the plaintiffs to move to enter the verdict for £100 17s. 8d. upon the common counts, being the balance of the proceeds of the goods, if the Court should think that they were entitled to recover thereon; and also, to enter a verdict on the first count for such amount, not exceeding £500, as the Court may think fit, the jury having assessed the value of the goods at £500.

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A rule *nisi* accordingly having been obtained.

Sir *W. Manning*, Q. C., for the defendant, now showed cause. The taking out of Court the money paid in on the count for money had and received, was a clear waiver of the tort. The plaintiffs could, if they pleased, waive the tort, and adopt the sale, and sue for the proceeds of the sale as money received to their use. If, before the action, the two plaintiffs had applied to the bailiff, or to this defendant, for the surplus proceeds of the sale over and above the amount of the execution, and the defendant had paid the money to them, could they afterwards have sued for the tort? What, then, is the difference practically now, where the plaintiffs have taken and accepted the sum paid in as money received by the defendant to their use? Surely that is a waiver of the tort. It is submitted, also, that there is a misjoinder. *Smith* has no right of action, because the whole property of the partners were sold, instead of his undivided interest. How can *Smith* and *Matthews* complain of the sale when, as against *Smith*, it was a lawful sale. It was the bailiff's duty to sell *Smith's* undivided interest, and the effect of the sale was only to pass the property to that extent; and the sale as to *Matthews* had no legal operation at all. [Wise, J. The sheriff had no authority to sell any of the goods at all, but only an undivided moiety in them, and the

purchaser would become a partner with the other tenant in common ; "but if," says *Lindley* (a), citing *Mayhew v. Herrick*, "the sheriff sells, not the share of the execution debtor, but the goods themselves, he is accountable at law to the solvent partners for so much of the proceeds of the sale as is proportional to their share in the partnership."] As by the sale the tenancy in common between *Matthews* and *Smith* was at an end, how can they now jointly sue ?

The *Solicitor General* for the plaintiff. The taking out of Court of the money paid in, was in full satisfaction of the cause of action in the second count. Therefore, there was no issue or question on that count. But the claims here are not inconsistent, and the plaintiffs' admission on the latter was no evidence against them on the first count. [*Stephen*, C. J. The £157 paid in was taken out in "satisfaction of the cause of action," stated in the second count. But in their replication to a previous plea, the plaintiffs join issue on the defendant's denial that he owed more than £157, so that there was an issue raised on the second count.] In *Gould v. Oliver* (b), the first count of the declaration sued for damages for improper stowage by the defendant, and the second count went for general average, on the ground that the goods had been necessarily thrown overboard, the stowage being proper, and it was held that although the plaintiff accepted in full satisfaction the money paid into Court on the second count, he might still recover on the first count ; and that the defendant could not read the second count and proceedings thereon to the jury, as conclusive, or as any evidence to negative any allegation on the first count. [*Wise*, J. There the defendant wanted to use it to prove a fact, and to show how the plaintiff himself had alleged the fact to be ; here it is proposed to use the pleadings on the second count, not to throw any light on the facts, but to show how the facts have been treated by the plaintiffs. The question could not have arisen before the Common Law

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(a) *On Partnership*, p. 587.

(b) 2 M. & G., 208 ; S. P., *Fisher v. Aide*, 3 M. & W. 486.

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Procedure Act enabled counts in contract and tort to be joined.] The taking of the money out of Court can be at most only an admission, or a waiver, if it be one, to the extent of the sum taken out. [Stephen, C. J. The difficulty is that the plaintiff in the same breath in which he accepts the money, says that he means to proceed for the tort. How, then, does he waive the same tort?] *Steavenson v. Berwick* (a), *Valpy v. Sandars* (b), *Brewer v. Sparrow* (c), *Parker v. Pistor* (d), and *Chapman v. Koops* (e), were referred to.

Both the plaintiffs having been interested in the goods when seized, both must sue (f). The sheriff cannot seize, even where he seizes an undivided and unknown interest of the one partner, an excessively unreasonable quantity of goods. At all events he has no right to sell for more than the amount of the debt. Both parties were therefore injured, and so might sue, although differently interested. Nor could he sell the goods, but only *Smith's* undivided interest in them. [Stephen, C. J. Only *Matthews*, however, it would seem, was injured by this (g).] He also referred to *Bleaden v. Hancock* (h).

STEPHEN, C. J. The sheriff or special bailiff in this case was bound to seize the whole of the partnership effects, as accounts must be taken of the whole before the share of each partner can be ascertained. But he had no right to sell the corpus of the goods seized, but only the undivided interest of the debtor—whatever the interest of the execution debtor might turn out to be; and by such sale the vendee would have become tenant in common with the solvent partner, and the partnership *qua* the execution debtor would have been dissolved. By the sale, therefore, that took place on this occasion, he committed a wrong. He sold the corpus of the property of the partnership, and therefore what did not belong to the execution debtor—and he moreover

(a) 1 Q. B., 154. (b) 5 C. B., 887; 17 L. J. C. P., 249.
 (c) 7 B. & C., 310. (d) 3 B. & P., 288.
 (e) Id., 289. (f) See 2 Wms. Saund. 116, n. (2).
 (g) See *Johnson v. Evans*, 7 M. & G., 240.
 (h) 4 C. & P., 152.

delivered possession of the goods to the several vendees. But at the moment of that act being committed, both partners were jointly owners of the goods. The property in them was not changed by the seizure, though the sheriff had a special property, by his possession, as against any mere wrong doer. When the sale took place, the execution debtor was interested that no more than his interest should be sold. Had his interest only been sold, the solvent partner might have bought in such interest. As therefore a wrong was done by the sale of the goods of *Matthews* and *Smith*, and at the moment of the sale, therefore *Matthews* and *Smith* may jointly sue in respect of that illegal sale.

Secondly, the plaintiffs nevertheless had their option either to treat the sale strictly as a wrong, in which case they would be entitled to the value of the goods wrongfully sold, or to waive the tort and consider the produce of the sale as their property; and we think that by taking the money paid in under the money count out of Court, the plaintiffs have waived the tort indefeasibly, especially as when so doing they take issue on the defendant's allegation that no more was due. It appearing that in fact the sum paid in represented only the amount of the balance of the proceeds after deducting the amount of the levy authorized by the writ, we direct that a verdict should be entered for the plaintiffs, pursuant to the leave reserved, for the latter amount in addition; for the defendant here can have no more right to retain a portion of the proceeds of the illegal seizure, as against these plaintiffs, than if the claim had been solely under the first count.

MILFORD, J., and WISE, J., concurred.

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SMITH
and
MATTHEWS
v
Ogg.

1864.

March 11.

TATE *against* GOODLET.

Practice as to granting special juries of twelve.

THIS was an action to recover damages for the loss sustained by the plaintiff by the death of her husband, while in defendant's employment, caused by the breaking of some steam machinery in the saw mills of the defendant. The first count of the declaration alleged the injury to have been caused by the insecure state of the house in which the machinery was standing; and the second count, by the machinery itself being insecure.

Darley, for the plaintiff, moved for the jury of twelve common jurors.

Stephen, for the defendant, opposed the application, and asked that the jury might be made special, as the pleadings showed that difficult questions of law and fact were likely to arise at the trial.

Darley in reply. The plaintiff's poverty will be considered by the Court as a reason why a common jury should be ordered rather than a special, as the trial was in that case attended with less expense. It was decided by his Honor Mr. Justice *Wise*, in Chambers (a), in *Fitch v. Liverpool and London Fire and Life Insurance Company*, that the party who succeeds, is by the act entitled "as costs in the cause" to the costs of any extra allowance ordered by the Judge under 15 Vic., No. 3 sect. 2; and this rule was held to apply in a case which lasted several days, although the case had been protracted entirely by the trial of an issue upon which that party failed.

The present case is very like that of *Thompson v. The Commissioner of Railways* (b), in which,

(a) December, 1863.

(b) April 7, 1863. In the case referred to, the plaintiff applied for a common jury of twelve, which the defendant opposed; the affidavit of the latter stated that the cause of action was for injuries caused to the plaintiff's wife, through the alleged carelessness, negligence, and improper conduct of the defendant; that the defendant had pleaded not guilty, and that he was of the class of special jurors.

Per Curiam. The onus lying on the defendant of showing that a special jury ought to be granted, and there not appearing to be in issue any question of skill, or science, or difficulty, the application will be granted.

although the difficult question of contributory negligence was in issue, and the defendant was the Commissioner of Railways, the Court granted the application of the plaintiff for a common jury of twelve, notwithstanding the opposition of the defendant, who wished it to be made special. It must be admitted that questions of engineering may arise in this case.

Per Curiam. The order will be, that this case be tried by a jury of twelve persons, from the class of special jurors. It is admitted that difficult questions of law and fact will arise, which require powers more likely to be possessed by special jurors. The poverty or wealth of the plaintiff is immaterial.

Order accordingly.

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GRAHAM *against* COMMISSIONER OF RAILWAYS.

March, 24,
1864.

ISAACS for the plaintiff, applied for a common jury of twelve.

The *Solicitor General* contra, asked that it might be made special. It was an action for breach of contract, and no affidavit had been filed on behalf of the defendant.

Per Curiam. In this case, as in *Thompson v. The Commissioner of Railways*, there is nothing shown to take the case out of the general rule. It is a mere question of contract.

NASH *against* THE BANK OF NEW SOUTH WALES.

March 24

ISAACS for the defendants, applied for a special jury of twelve. It was an action against the bank for dishonoring the plaintiff's cheque for £2,400; and it was sworn that difficult questions of law were likely to arise; that the defence was, that a cheque for £2,400, bearing the name of, and purporting to have been drawn by, the plaintiff on the defendants, and paid by them to the bearer thereof, and charged to the plaintiff's account in the defendant's books, was not a forgery,

1864. as alleged by the plaintiff; that there would be a comparison of handwritings, and that the character of the plaintiff was involved.

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NEW SOUTH
WALES.

Sheppard for the plaintiff, opposed the application.

Per Curiam.

Application granted.

December 4,
1863.

WATERSON *against* BARCLAY.

White contracted to sell some land to the plaintiff, upon which the defendant had some claim. The defendant gave to the plaintiff a written promise in the following terms:—"I G. B., do hereby guarantee a genuine title to the farm purchased by W. W. (the plaintiff), from *White*, containing &c., and known as *White's* farm, in consideration of his causing to be placed to my credit in the Commercial Bank, Sydney, at once, the amount of purchase money, £480" signed by the defendant.

Held that the only promise contained in this instrument was, that the defendant would guarantee that *White* should have a good and valid title, and should be in a position to convey—but not that *White* would execute a conveyance to the plaintiff.

THE declaration stated that the plaintiff had purchased from one *White* a farm known as *White's* farm, containing 47 acres, more or less, upon which farm the defendant had, or claimed to have, a charge for money advanced by him to *White*; and that one of the conditions of the purchase by the plaintiff was that the farm should, previous to, or contemporaneous with, the payment by the plaintiff of the purchase money, be conveyed to the plaintiff with a genuine good and perfect title thereto. It then averred that the defendant, with knowledge of the premises, made, signed, and delivered to the plaintiff the following memorandum:—"Eden, 1st October, 1860. I, *George Barclay*, do hereby guarantee a genuine title to the farm purchased by Mr. *William Waterson* from *William White*, of Bega, containing 47 acres, more or less, and known as *White's* farm, in consideration of his causing to be placed to my, or in the Commercial Bank, Sydney, at once, the amount of balance of purchase money, £480. *George Barclay.*"

After identifying the persons named in the memorandum with the plaintiff and defendant, the declaration stated that the plaintiff did at once place to the defendant's credit in the Commercial Bank, Sydney, the sum of £480, and averred the fulfilment of all conditions precedent. Breach, that "neither has a genuine title, nor any title been made to the farm so purchased,

&c., either by the defendant or by any other person, and that the defendant had refused to perform and fulfil the guarantee so made by him—nor has the farm been conveyed to the plaintiff with a genuine, good, and perfect title thereto, or at all, whereby, &c.

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 v.
 BAROLAY.

Demurrer and joinder.

Darley in support of the declaration. The Court will endeavour to discover and carry into effect the mutual intention of the parties to this instrument; but if the words are ambiguous, it will construe them most strongly against the party who gave the instrument. This principle has been frequently held to apply in the case of guarantees; *Mason v. Pritchard* (a), *Hargreave v. Smee* (b). In the case of a guarantee, as in the case of a charter party or other mercantile instrument, the Court will look at the subject matter, and will not be restrained to such nicety of construction as is the case with regard to conveyances, pleadings, or the like; *Cockburn v. Alexander* (c). The plaintiff complains that he can neither get the money he paid, or the conveyance he bargained for. The genuine title that the defendant guaranteed, must mean a genuine title to be vested in the plaintiff, and that must be by conveyance, and not a genuine title in *White*. Upon a true construction of the guaranteee, taken in connection with the several allegations in the declaration, the defendant promised, in consideration of the plaintiff's paying to the defendant the balance of the purchase money for the farm, in discharge of the defendant's claim upon the same, that a genuine title in the farm should become vested in the plaintiff. *Fowkes v. Manchester and London A. Co.* (d), *The Eastern Co. R. v. Marriage* (e), and *Broom's Legal Maxims* (f), were referred to.

Stephen, who appeared to support the plea and the demurrer to the declaration, was not called upon.

(a) 12 East 227.

(b) 6 Bing. 244.

(c) 6 C. B. 814.

(d) 32 L. J. Q. B. 153.

(e) 31 L. J. Ex. 73, 85.

(f) p. 532.

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STEPHEN, C. J. I am so clearly of opinion that the declaration is bad that I do not think it is necessary to consider the plea. This document does not appear to me to be a mercantile instrument or guarantee, to which any other than the ordinary rules of construction ought to be applied, although if such rules had been resorted to, my opinion would have been the same. It is a simple unilateral promise which need not have been in writing under the statute of frauds. *White* sold some land to the plaintiff; but what was the purchase money, and whether any of it or how much was still due does not appear. The defendant says, "I have a claim for £480, the balance of the purchase money" (all but that amount having either been paid or ascertained); "pay me that amount, and I will guarantee a genuine title." I am of opinion that the only promise made by him, was that *White* had a good and valid title, and so should be in a position to convey. Why should he say or do more? How could he guarantee that *White* would convey to the plaintiff? It strikes me that that was the contract between these parties. In thus construing the agreement, I have got rid of the difficulty introduced by the word "his," and the question whether the person intended to be referred to was the plaintiff or *White*. The expression is ambiguous; but I have assumed that the plaintiff was the person to whom or in whose favor this promise was made; but it seems to me that the plaintiff must fail, unless he can show some breach of the warranty that the vendor *White* had a good title to this land.

WISE, J. I am of opinion that this document is not to be construed as a mercantile instrument, if more latitude is allowed in interpreting such instruments. This is an ordinary agreement. I have considered the position of these parties upon the facts disclosed upon this declaration, and it appears that there being a contract of sale between the plaintiff and *White*, this document was given; and it seems to me to be a guarantee not that a conveyance should be executed, but that the

vendor had a good title. The natural meaning of it would be that the vendor had a good title by which he was able to convey, or that the conveyance when executed by him would be valid. Why, when the defendant had no power to compel him to execute a conveyance, should he guarantee that he would do so? It seems to me improbable that he would undertake what he could not enforce. But under the circumstances he undertakes that a good title should be made to this property.

Judgment for the defendant.

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MORT and others *against* HUGHES and others.

March 11,
1864.

THIS was an appeal from the Metropolitan District Court.

The plaint was for interest and on an account stated, the particulars being "for interest at 9 per cent. on money due by defendants to plaintiffs, between 17th September, 1861, and 21st May, 1862, £33 12s."

It appeared that the defendants had overpaid to the plaintiffs £560, on 17th September, 1861. After two or three demands for the amount, and no compliance or reply, the plaintiffs wrote on 3rd January, 1862, as follows:—"We much regret that the sum of £560, paid by us in error to the trustees of the late Mrs. Terry's estate, on the 17th September last, has not been refunded. We applied for it on the 23rd October last, and the delay has occasioned great loss of interest, besides much annoyance, in having such a transaction open in our books. Our object in addressing you, is to inform you that we shall look to the trustees for bank interest on the amount, and that, disagreeable as may be the consequences, if the amount be not paid by Monday next, we shall be compelled to adopt such measures for its recovery as our solicitor may recommend." The defendants still neglected to repay the money or to answer the letter. On the 17th January, 1862, the defendants

The plaintiffs overpaid the defendants £560. After several demands, and no compliance or reply, the plaintiffs wrote giving notice that they should insist on interest. The defendants still neglected to repay the amount or to answer the letters; but at last they repaid the principal, but not the interest.

Held that the plaintiffs were not under the circumstances, entitled to recover the interest, although under 5 Vic., No. 9, sect. 23, the jury, if they thought fit, might have given interest in an action for the principal.

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wrote, stating that "if the said sum of £560 be not refunded to us in all next week, together with bank interest, the trustees will oblige us to hand it over to our solicitor for recovery."

On the 21st May, 1862, the sum of £560 was repaid to the plaintiffs, the latter refusing at first to accept it without the interest being paid, and at length only receiving it under protest. The plaintiffs then sued the defendants in the District Court for the interest. At the trial, the above facts having been proved, the defendants contended that no contract for the payment of interest was made out.

The appeal case then stated that the learned District Court Judge who tried the case, "held that an agreement to pay interest from the date of the letter of the 3rd January, 1862, might be implied from the actings of the parties, holding that the nonpayment of the said sum, after notice by plaintiffs that interest would be claimed, amounted to an assent by defendants to pay such interest as long as they should hold the money. The Judge accordingly gave a verdict for £18, being for interest from the date of such letter until the date of repayment. The question for the opinion of the Supreme Court is, whether the Judge was right in so holding or in finding the verdict."

Stephen for the appellant. There was no contract between these parties; no contract by the plaintiffs to allow this money to remain in the defendants' hands, or by the defendants to accept such loan and pay interest. The twenty-third section of the Act for the better Advancement of Justice (a), provides that "upon all debts or sums certain, to be recovered in any action, the jury may, on the trial of any issue, if they think fit, allow interest to the creditor at a rate not exceeding 8 per cent. from the time when demand of payment shall have been made in writing, giving notice to the debtor that interest would be claimed from the date of such demand." But that statute can apply only to cases where the principal

(a) 5 Vic. No. 9.

sum is recovered in an action, and the interest is given by the jury as damages.

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Isaacs for the respondent. The letters amounted to notice to the defendants that if they continued to hold the money, it would be subject to this charge, and the defendants retained the money under this implied condition. The words of the statute expressly give this right to the plaintiff. [Stephen, C. J. It may be that when once the action has been brought, the plaintiff has an inchoate right to the interest under the statute; and so if the principal was paid into Court he might reply damages *ultra*.] At the trial, there was no application for a non-suit; and it must be taken that the verdict was given by the Judge upon the facts before him, and is not therefore matter for appeal. He referred to *Lucy v. Mouslet* (a).

STEPHEN, C. J. The question submitted to us is, whether on the evidence before the Judge there was any case to go to the jury? and on that question of law I am of opinion that the learned Judge was mistaken. If it was intended to raise the question whether the learned Judge had drawn an inference which he had no right to draw, it should not have been sent to us. The case cited is clearly distinguishable. In that case the plaintiff sold some cider to the defendant, which, when delivered and tapped, was found to be unfit for use. The defendant at once wrote to the plaintiff that the little he had sold was complained of, and that if it continued to be so, he should have to return it. No notice of this letter was taken for about a month, during which time the defendant was trying to sell it, and found it unsaleable. He then wrote to the plaintiff, proposing to return it. The plaintiff having refused to accept it, sued for the price, and it was held that as the plaintiff did not answer the letter, and dissent from the defendant's proposition to continue to try the cider and see if it was saleable, he must be taken to have acquiesced, and to have therefore

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waived his strict legal right to recover for the whole. In the present case it appears that the plaintiffs overpaid the defendants a large sum of money; and after two or three demands, and non-compliance or reply, the plaintiffs wrote and gave notice that they should insist upon the payment of interest. The defendants neglected to pay or to answer the letters. At last they paid the principal, but not any interest; and that amount accordingly was sued for in the present action in the District Court. The learned Judge held that the defendants' delay, after the course taken by both parties, was evidence of a contract by the defendants to pay interest. I think that there was no evidence of any such contract at all. The defendants may have received this money as trustees, and it may have been divided among those interested, so that the trustees might not have been able at once to replace the funds.

I am of opinion that the plaintiffs are not entitled to interest at all. And although the jury, if they think fit, may give interest in an action for the principal under the statute, I should much doubt if the debtor has paid the principal without interest before action brought, whether the question could go to the jury.

WISE, J., concurred.

WALLACK and another *against* A'TEAK.

A. bought goods of the plaintiff, and at the request of the defendant, the plaintiff gave A. credit for three months, and afterwards the defendant accepted a bill of exchange at three months for the amount. In an action on the bill it being found that the defendant originally promised to pay for the goods in case of A.'s default, Held that the subsequent acceptance of the bill was not for the plaintiff's accommodation, but was supported by a good legal consideration.

Held, also, that as A. obtained three days' credit beyond the time originally stipulated for, the acceptance could be supported on that ground also.

It appeared at the trial before *Wise*, J., in the November sittings, that one *Ivan* bought certain goods from the plaintiffs—and at the request of the defendant, the plaintiffs gave *Ivan* credit for them for three months—and afterwards the defendant accepted this bill at three months for this debt. The jury found first, that the purchase was not for *A'Teak*—that is, that *A'Teak* was not liable for the amount; and secondly, that credit was given to *Ivan* at *A'Teak's* request, and the bill given subsequently for the debt of *Ivan*; whereupon the learned Judge directed the verdict to be entered for the plaintiff.

Salamons obtained a rule *nisi* to set aside the verdict and enter it for the defendant, on the ground that the verdict ought to have been so entered on the special finding of the jury.

Stephen now showed cause. The plaintiffs are entitled to hold their verdict, for there was a sufficient consideration in the three days' extension of time by the days of grace. But here there was more, for the original credit was given at the defendant's request, and carried out by his acceptance. Although this bill was subsequently given, the previous concession of time by the plaintiffs, at the request of the defendant, was a sufficient consideration. A debt due from a third person is a good consideration for a note payable at a future day, although it appears that it would not be if the note be payable on demand. *Crofts v. Beale* (a), *Bacon v. Walker* (b), *Sowerby v. Butcher* (c), *Syson v. Kidman* (d), *Byles* (e) and *Chitty* (f) on Bills, were referred to.

Salamons contra. *Syson v. Kidman* is explained in *Crofts v. Beale*, by *Maule*, J. "There," he says, "the plea was that the defendant never had any value or consideration for the note; it admits that there was a consideration, but alleges that the defendant had none." It

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March 21,
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(a) 11 C. B. 172. (b) 14 M. & W. 468. (c) 2 Cr. & M. 368.
(d) 3 M. & G. 810; S. C., 11 L. J. C. P. 100.
(e) p. 109 [7th Ed.] (f) p. 52.

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is submitted that no person was liable at the time this bill was given, and therefore it is void for want of consideration. The three months' credit had already been given, and that period had not expired. The case of *Jones v. Ashburnham* (a) is expressly in point. There the plaintiff declared that *A.*, since deceased, was indebted to him so much—and that after his death, in consideration of the premises and that he, at the instance of the defendant, would forbear and give day of payment of the debt (not stating to whom he was to forbear) the defendant promised, &c.—and it was held to be no consideration for the promise, for a promise could only be sustained on a consideration of benefit to the defendant, or of detriment to the plaintiff—and unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. So here the consideration also was past and executed, and so would support no other promise than such as would be implied by law from that executed consideration; *Roscorla v. Thomas* (b). Here the implied promise would be to pay *in praesenti*, and a promise to pay *in futuro* would be void as being without consideration. [*Wise, J.* The promissory note is for the same time for which the credit was originally given.] It is submitted that the giving this acceptance was wholly without consideration. *Wennall v. Adney* (c), *Eastwood v. Kenyon* (d), *Elderton v. Emmens* (e), and *Broom's Commentaries* (f) were referred to. [*Stephen, C. J.*, referred to *Cresswell v. Wood* (g).

STEPHEN, C. J. It being proved and in effect found by the jury that the defendant originally promised orally (which promise, therefore, cannot be enforced by the statute of Frauds), to pay for the goods in case of *Ivan's* default, it seems to me that the subsequent acceptance of the bill was not for the plaintiff's accommodation in any fair or just sense, but is supported by a good legal consideration.

(a) 4 East 455.
 (c) 8 B. & P. 252.
 (e) 6 C. B. 174.

(b) 3 Q. B. 234.
 (d) 11 A. & E. 349.
 (f) p. 326.

(g) 10 A. & E. 460.

Secondly, as the credit given to *Ivan* was for three months (which it is to be presumed are calendar months), the acceptance would not have been supported by any consideration of forbearance, or giving of time, were it for no more than these three months. If the bill had been in fact payable at the precise date when the stipulated credit had expired, the authorities cited would apply; but as it was for three months and three days, during all which period *Ivan* obtained the same credit; the plaintiffs gave to him three days additional time, practically at the instance of the defendant, and the acceptance may be sustained on that ground also.

WISE, J., concurred.

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ATTORNEY GENERAL *against* ROBINSON.

March 9,
1864.

THIS was an information of intrusion to recover possession of certain land near Bathurst. Plea, not guilty.

The case was tried before *Wise*, J., at the Bathurst Assizes, in September, 1863, when it appeared that the defendant had been in possession of the land in question for more than twenty, but less than sixty years. The Judge directed the jury that the Crown was not bound to prove its title, and that the plaintiff was entitled to the verdict.

A rule *nisi* for a new trial having been granted, *Butler*, for the Crown, showed cause, and referred to *Attorney General v. Brown* (a), *Attorney General v. Parsons* (b); and the colonial decisions, *Attorney General v. Brown* (c), and *Attorney General v. Ryan* (d).

In an information of intrusion for land, of which the defendant had been in possession more than twenty, but less than sixty years. Held that the Crown was entitled to recover. The 21 Jac. I., c. 14, is not in force in this colony. (*Milford, J. dissentiente.*)

Stephen, for the defendant, offered no argument.

STEPHEN, C. J. The Crown is entitled to our judgment, whether the statute of 21 Jac. I., c. 14, is in force in this colony or not. For the Crown's title was shown,

(a) 14 M. & W. 300.
(c) 10 February, 1847.

(b) 2 M. & W. 28.
(d) 16 July, 1852.

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in other words it necessarily appeared by the mere fact that the defendant had never received, nor had there ever been issued, a grant of the property. In *Hatfield v. Alford* (a), although it was not necessary to decide the point, I sufficiently indicated my opinion that that statute was not applicable to this colony. That was an action of replevin. The defendant avowed as landlord of the plaintiff for rent in arrear; and to this the plaintiff pleaded *non tenuit*; and the question was whether the title of one *John Levey* was enforceable by law, as against the defendant, who had been in possession of the land for several years. My written judgment is as follows:—"John Levey, the claimant of that title, was proved to be the eldest son of *Solomon Levey*, to whom the Crown granted the property in 1831. Now we require no evidence to enable us to say, because this Court takes judicial notice of the fact, that the Crown was the legal owner of all land in this colony, at the time of its first settlement in 1788. We must presume the Crown, therefore, (in the absence of all evidence, or suggestion, of any previous grant of the property), to have been at the date of its grant to *Levey*, the legal owner of this particular land. In fact, no question was made as to this; nor was it disputed, that a valid title was conveyed by that grant from the Crown to *Levey*. But, it having been shown that, at the time of the latter's claim, which was in 1844, there had been a possession in fact in other parties, (that is in *Alford* or his father), for twenty-three years, it was contended that *Levey* could not have maintained an ejectment. The Judge ruled, however, that no adverse possession could be effectual against *Levey*, or those claiming under him, except such as occurred after the date of the grant; since which, the possession had extended over a period of thirteen years only. His Honor further said, that a title must be presumed to have been in the Crown, at the time of the making of that grant. I am of opinion that the Judge was right on both points. As to the latter I think it sufficient to

(a) February, 1847.

say, that bare possession in a subject cannot, I conceive, as against the Crown, with respect to lands in this colony, be taken to afford any presumption of title; if for no other reason, than the peculiar character of titles in New South Wales, which are all derived from the Crown, and at periods of which the longest is comparatively recent, and necessarily within sixty years. But it seems plain, from the nature of the ordinary Crown remedy, in respect of lands claimed for the Crown, that no title is presumed against the Crown, from possession merely. Upon an information of intrusion, (unless the Crown shall have been twenty years out of possession,) the subject must show his title specially; and that on the record. He cannot rely on his possession, and put the Crown to show title (a). And it is laid down, generally, that as against the Crown the subject must show title in all cases; and cannot rely on possession merely (b). Had the Crown been twenty years out of possession, instead of ten only, the statute 21 Jac. I., c. 14, (supposing it to be in force in this colony, which I am strongly inclined to think it is not,) would so far have effected an alteration, that it would then have been unnecessary for the defendant, on intrusion brought, to plead his title specially; but, without showing it on the record, as in ordinary cases he must do,—he would be entitled to retain possession, till the title was found for the Crown. It would seem also (c), that the rules of evidence are, in that case, the same as between subjects; and that the onus of proving title, is then cast on the Crown. Supposing the Crown, however, as to that matter, to be in such cases in the position of an ordinary plaintiff, yet it is not easy to see how the defendant's possession could, practically, effect any change. The Crown could not, after all, in effect, be made to prove its title; since that title rests, in this colony, on matter of judicial cognizance. It might, perhaps, be put to show, to be sure, that there was no record of any grant of the land in

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(a) Ch. Prerog. 838.

(b) *Ibid.* p. 353, 357. Staunf. Prer. 63 a.

(c) *Attorney-General v. Parsons*, 2 M. & W. 28.

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question; but that would scarcely help the defendant. It is not necessary for me, however, considering the view which I take on this part of the case, to go more fully into that question; or to express any opinion, as to the supposed effect of the decision, in *Doe v. Morris* (*a*), with respect to the mode, or time, of finding or trying the title of the Crown, after twenty years non-possession. The last mentioned point, in fact, (independently of any reasoning on the subject) seems to be set quite at rest, by the *Attorney General v. Parsons*, already cited." In the same case, Mr. Justice *Dickinson* says:—"If *Alford* had continued adversely possessed in fact, for twenty years and more, then by statute 21 Jac. I., c. 14, the Crown title would not have been barred, but the burden of proof would (assuming this statute to be in force in this colony) have been shifted from *Alford* to the Crown in the trial upon its writ of intrusion, *Attorney General v. Parsons* (*f*). Were we to hold that the Crown must grant by special words in every case where a subject had wrongfully intruded on its domains, there would be imposed on the Crown or its grantee, the trouble of ascertaining in all cases, whether or not there was a person in wrongful occupation, and the decision would be productive, in such a vast territory as this, of the greatest public inconvenience—and an inconvenience to the public is sufficient to prevent the application of a rule of the common law, however logically the conclusion may follow in abstract reasoning, or however strictly it would be applied in a case which might involve a hardship on an individual." And Mr. Justice *Therry* also especially guards himself from being supposed to decide that the 21 Jac. I., c. 14, is applicable to the colony. I am of opinion that the language used in the 21 Jac., c. 14, s. 4, shows that it is not applicable to the circumstances of this colony.

MILFORD, J. I agree that in this particular case the Crown must succeed. But I doubt whether the 21 Jac. I., c. 14, and the 9 Geo. III., c. 16, are not in force in

(a) 2 B. N. C. 198.

(b) 2 M. & W. 23.

this colony—or rather I am of opinion that they are in force. No occupation, however, short of sixty years, can establish a title against the Crown in any information of intrusion.

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WISE, J. I think the verdict must stand, and that my direction was right, being in accordance with the *Attorney-General v. Brown*. I am of opinion that the 21 Jac. I., c. 14, does not apply to this colony. I have not considered the question raised by my learned colleague Mr. Justice *Milford*, and give no opinion one way or the other.

Rule discharged.

The COMMERCIAL BANKING COMPANY *against*
BALGARNIE and others.

March 11.

STEPHEN (*Foster* with him), for the plaintiffs, moved to make absolute a rule *nisi* for a prohibition to the learned District Court Judge of the Hunter River District, on the ground that he, being a shareholder in the Commercial Bank, had heard and decided the case of *Balgarnie v. The Commercial Bank*. The application was made immediately it was known that the Judge was a shareholder, a fact which he alone could be acquainted, as he might have parted with his shares at any time. It appeared that the learned Judge's decision was against the bank; that no objection was taken while the case was proceeding; but that during the same day in a subsequent case, the Judge said that he was a shareholder, and that then the application was at once made to him; and that he, thinking the application should be made to the Supreme Court, granted a stay of proceedings until such application could be made.

Where a District Court Judge had tried and given judgment in a case in which one of the parties was a joint stock company, in which the Judge was a shareholder, a prohibition was granted, although the objection was not taken while the cause was proceeding, and although the judgment of the District Court Judge was against the said company.

Darley showed cause. The Commercial Bank being the defendant in this act, ought to have, and must have, known their own partners, and cannot now, after taking the chance of a favourable decision, obtain what amounts

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practically to be a reversal of that decision, when they find that is given against them. *Yates v. Palmer* (*a*) is an authority that the application is too late; and as the decision, under such circumstances, is voidable and not void, the Court will not interfere. In *Grand Junction Canal Company v. Dimes* (*b*), Lord *Langdale* says "it seems scarcely worth while to consider the nature or amount of the interest attached to such shares in a joint stock company, the value depending on the market price on sale or on the result of a winding up of the affairs of the company. He has a strange notion of things, who supposes such an interest to be capable of producing any bias on the mind of a Judge administering justice in public, and subject to appeal, in a matter having no direct or special relation to the value of such shares." In the present case, the decision of the District Court Judge was against the bank in which he was a shareholder.

STEPHEN, C. J. I am of opinion that the prohibition must go. It is impossible to allow any case, under any circumstances, to be tried by a Judge, who is interested in the matter. I do not put the case on the ground of any supposed bias; but on the ground that such a proceeding is contrary to just principles.

WISE, J. I think the application must succeed, because the Judge was interested, apart from sec. 58 of the District Court Act altogether. In *Dimes v. Proprietors of the Grand Junction Canal* (*c*), in which case the Lord Chancellor's decree was reversed, on the ground that he being a shareholder, was interested, Lord *Campbell* says, "No one can suppose that Lord *Cottenham* could be, in the remotest degree, influenced by the interest he had in this concern; but, it is of the last importance that the maxim that no man is to be a Judge in his own cause, should be held sacred. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside

(*a*) 6 D. & L., 283.

(*b*) 12 Beav. 75.

(*c*) 8 H. L. C., 798.

proceedings in inferior tribunals, because an individual who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals, to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence" (a.)

Prohibition to go without costs; the writ to lie in the office for fourteen days, to give time to the District Court Judge to remove the case to another Court.

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DINES *against* ROSSITUR.

March 9.

THE declaration was for money had and received, and on accounts stated.

The second plea alleged that certain contracts by way of gaming and wagering, that is to say, by betting on the event of a certain race, were entered into by and between the plaintiff and one *F. M. Doyle*, and by and between the plaintiff and one — *Mears*; and that the sum of money herein sued for, is money which was deposited in the hands of the defendant, to abide the event on which the said contracts of gaming and wagering were made; and the said money so deposited was not a subscription or contribution for or towards any plate, prize, or sum of money to be awarded to the winner or winners of the said contract, or of any lawful game, sport, pastime, or exercise. Averment, that the event of the horse race, to abide which the money had been deposited by the plaintiff with the defendant, happened

Money had and received; accounts stated. Plea, alleging a gaming contract by betting on the event of a horse race, and that the money sued for was deposited by the plaintiff in defendant's hands to abide such event, in general terms of the eighth section of 14 Vic. No. 9, and negativing the exception in the proviso. Averment, that the event

of the horse race, to abide which the money had been deposited by the plaintiff with the defendant, had happened before any notice of the plaintiff to the defendant, requiring the latter to repay the amount so deposited. *Held* bad.

(a) See *R. v. Allen*, 33 L. J. M. C. 98.

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before any notice of the plaintiff to the defendant, requiring the defendant to repay to the plaintiff the money so deposited.

Demurrer and joinder.

Darley, in support of the demurrer. The plea shows that this is an action to recover back money deposited by the plaintiff with the defendant; and that, therefore, the action is not brought by the winner of the event to recover the whole amount deposited by both parties. The proper construction of the eighth (a) section of the 14 Vic. No. 9, is that it only applies to winners recovering the full amount, *Varney v. Hickman* (b); and not to either winner or loser recovering his own stake. A party repudiating a wager before the result is ascertained, can recover his deposit from the stakeholder notwithstanding this act; *Martin v. Hewson* (c). And it can also be recovered back after the event has been decided, but before the money has been paid over; because the contract is not completely executed till the money is paid over, *Hastelow v. Jackson* (d). "Where the event," says *Littledale*, J., in that case, "has happened, but before the money has been paid over, one party expresses his dissent from the payment, under such circumstances he may recover it." The plea shows that it is an illegal wager, and there is, till the money is paid over, a *locus penitentiae* for the person who has made a deposit to recover it back. The action is not founded upon the illegal contract, but the plaintiff is seeking, in the words of *Maule*, J., in *Varney v. Hickman*, "to recover money which belongs to him, and which the defendant has no

(a) The section is as follows:—"That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of Law or Equity, for recovering any sum of money or valuable things alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

(b) 5 C. B. 271; 17 L. J. C. P. 102.

(c) 10 Exch. 737; 24 L. J. Ex. 174.

(d) 8 B. & C. 227.

right to keep, and which he is under no legal or moral obligation to pay to anybody else."

The *Solicitor-General* (*Sheppard* with him), in support of the plea. The statute says that "no suit shall be brought or maintained for recovering any sum of money alleged to have been won upon any wager—or which shall have been deposited in the hands of any person to abide the event." The former part of the section refers to suits to recover the whole amount which has been won; and the second part to suits like the present to recover the amount deposited; and in both cases the plaintiff is not allowed to recover. In *Varney v. Hickman*, the plaintiff was the owner of one of the horses, and that brought him within the proviso; and it is an authority to show that although the mere better on a horse race is unable to recover, the owner of the horse can; the one being the winner of the event, and therefore within the proviso; the other being merely the winner of a wager. In *Batty v. Marriott* (a), *Wilde*, C. J., says, that it is clear that horse racing "was not intended to be discouraged by this statute; and *Coltman*, J., referring to the proviso says, "it evidently contemplated the case of sweepstakes, where several persons subscribe to a stake or fund, the whole of which becomes, under certain regulations, the property of the winner." He also referred to *Armstrong v. O'Brien* (b).

(a) 5 C. B. 818; 17 L. J. C. P. 215.

(b) 21 December, 1859. This was an action to recover £150, said by the plaintiff to have been won on the result of a horse race, which said £150 had been mutually deposited with the defendant by the plaintiff and one *Beaton*, to abide such result. Plea, never indebted. Second, a plea in terms of 14 Vic., No. 9, sect. 8, that it was a sum alleged to be won on a wager. Under the first plea, evidence was gone into on both sides, as to the winning of the race, and on this issue the jury found for the plaintiff. But upon the second plea they found for the defendant.

Stephen for plaintiff, moved for judgment on the second plea *non obstante veredicto*. The plea is immaterial without negativing the exception or proviso in sect. 8. *Horwood v. Underhill* (*); *Grisewood v. Blane* (†). The case falls directly within the proviso, *Varney v. Hickman* (‡), *Batty v. Marriott* (§). We asked leave at the trial to reply the matter of the proviso, and it was refused. A horse race is clearly a lawful game. The real question at the trial was, whether the case was within sect. 8, i.e. not the first portion only but both portions—the whole of the section.

(*) 3 M. & S. 88.
(‡) 5 C. B. 271.

(†) 11 C. B. 526.
(§) Id. 818.

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STEPHEN, C. J. There must be judgment on this demurrer for the plaintiff. If we ruled otherwise, we should construe the enactment as creating a forfeiture of all sums of money deposited with stakeholders; whereas all the statute does is to prevent either depositor from recovering all the stakes, not to hinder him from getting back his own, which before payment over of it on the happening of the event he may on demand obtain, as was expressly decided in *Varney v. Hickman* (a).

Judgment for the plaintiff.

March 24,
1864.

Motions for new trials are not within Rule 6, of February 28, 1856, and therefore affidavits may be used in showing cause, although there has not been the notice or service required by that rule.

JONES against GORMAN.

IN this case, the defendant having obtained the verdict, the plaintiff had obtained a rule *nisi* for a new trial.

The *Attorney-General* and *Butler* showed cause, and proposed to use certain affidavits not filed till that morning.

Isaacs and *Darley* for the plaintiff, objected that they had been filed too late. Rule 6 (b) requires that a copy

(a) But see *Mearing v. Hellings*, 14 M. & W. 711.

(b) Sup. Ct. Prae. 22.

But if the Court thinks that this could not be the question, in the existing state of the record, the Court will allow an amendment now, or if not, will grant a new trial, *Prickett v. Badger* (*); *Edwards v. Hodges* (†), *Baker v. Forminger* (‡), *Gibson v. Doey* (§).

Wise and *Martin* for defendant. The second plea is good. The proviso is not equivalent to an exception, *Thibault v. Gibson* (||), *Simpson v. Ready* (¶), *Pilkington Cooke* (**), *Lawton v. Hickman* (††), *Batty v. Marriott* cannot be law. It is inconsistent with *Varney v. Hickman*, and its authority seems plainly doubted in *Parsons v. Alexander* (†††). The proviso need not be noticed in the plea. [Stephen, C. J. It is clear that the money was betted and deposited with the defendant by the owners of the two horses, and that one of them was the winner of the race.]

Per Curiam. On the authority of *Batty v. Marriott*, we hold that as the money was to go to the winner (not of the bet only but) of the game, the proviso in sect. 9 applies, and that the plaintiff is in law entitled to recover. We think, also, that the proviso in question is in effect an exception, and so that the plea was bad, for not showing that the plaintiff was not within the benefit of such exception. And having now the facts before us, it would be idle to allow the cause to go down again on such a point. The plaintiff, therefore, will have judgment on the second plea *non obstante veredicto*.

(*) 26 L. J. C. P. 83.
(||) 27 L. J. Ex. 37.
(**) 16 Id. 615.

(†) 24 L. J. M. C. 81.
(||) 12 M. & W. 88.
(††) 9 Q. B. 588.

(‡) 28 L. J. Ex. 131.
(¶) Id. 736.
(††) 5 E. & B. 263.

of the affidavit or notice of its having been filed shall be served before one o'clock in the afternoon of the preceding day.

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JONES
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Per Curiam. Affidavits in showing cause against motions for new trials are not within that rule. It has been so decided in *Hickey v. Cape*(a), where, on showing cause against a rule *nisi* for a new trial, on the ground of surprise on the plaintiff in the reception of the evidence of two particular witnesses, the defendant was allowed to use affidavits in answer, to the effect that the evidence of such witnesses was true; and related exclusively to matters within the plaintiff's own knowledge, although these affidavits were filed only on that morning.

Isaacs then asks for leave to file affidavits in reply.

Per Curiam. We reserve the decision on this point till we shall have heard the whole case argued.

The QUEEN *against* FOGG.

March 4.

“THE prisoners were jointly indicted for feloniously stealing one cow, &c., the property of one *William Fahey*, with a second count for receiving one cow, &c., the property of the said *William Fahey*, knowing, &c.

At the close of the case for the Crown (there being no evidence given affecting *William Fogg* the younger), I, at the request of Mr. *Wulsh*, attorney for the prisoners, directed the jury to acquit the younger *Fogg*.

For the defence, *William Fogg*, the younger, deposed that he shot the cow out of spite to the owner, and brought her into his father's yard, and skinned and dressed her for beef for the family—and that his father, with whom he lived, came home from reaping in the evening, and almost immediately went to bed and knew nothing about the affair till he was apprehended on the following morning. When he, the father, was appre-

A prisoner can be convicted of receiving a cow, then lately before feloniously stolen, knowing it to have been stolen, although the cow was dead at the time when received.

(a) July 7, 1863.

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hended, and told by the constable that he was charged with stealing *Fahey's* cow, he said nothing, but on the road to the lock-up he said the cow was his own.

A point being raised by Mr. *Walsh* whether the prisoner *William Fogg*, the elder, could be found guilty on the second count if the jury should find that the cow was dead when he received it, and my opinion being requested, I directed the jury that if they acquitted the prisoner on the first count, but were of opinion that the prisoner feloniously received it, knowing it to have been stolen, it was immaterial whether at the time of his receiving it, it had or had not been killed since the stealing.

The jury found specially that the prisoner was guilty of feloniously receiving a dead beast, knowing that it had been stolen. This was recorded as a verdict of guilty on the second count, and I sentenced the prisoner to twelve months imprisonment in Goulburn gaol.

The point reserved is whether or not my direction to the jury on the abovenamed question was correct.

F. W. MEYMOTT,
February 20, 1864. *Chairman.*"

Butler appeared for the prisoner, and referred to *R. v. Edwards* (a), *R. v. Halloway* (b), *R. v. Puckering* (c).

No counsel appeared on behalf of the Crown.

STEPHEN, C. J. I am of opinion that this conviction must be supported. According to the decision of Mr. Justice *Holroyd* in *Edwards*' case (a), an indictment for stealing a dead animal should state that it was dead—for upon a general statement that a party stole an animal, it is to be intended that he stole it alive. This decision took place in 1823; and in the same year, Mr. Baron *Hullock* (b) held that an indictment for stealing "two turkeys" was not supported by evidence of stealing two dead turkeys, as "two turkeys" must be taken to mean live turkeys. But in 1829, it was held that if an animal

(a) *R. & R.* 497.

(b) *1 C. & P.* 128.
(c) *1 Mood. C. C.* 242.

have the same appellation whether he be alive or dead, and the indictment uses such appellation, it is no variance if the animal was dead at the time the offence was committed; *R. v. Puckering* (a). In that case the prisoner was indicted for receiving a lamb, knowing the same to have been stolen, and the lamb had been killed before it was received; and all the Judges agreed that the conviction was good, as it was immaterial as to the prisoner's offence whether the lamb was alive or dead—the offence and the punishment for it being in both cases the same. This latter case must be taken to overrule *R. v. Halloway* and *R. v. Edwards*; and I am of opinion that we cannot say the present conviction is wrong without overruling it. The cow was, it seems, stolen when alive—and although it was dead at the time when received, the thing received was still a cow.

WISE, J. Two persons were indicted, and one was called as a witness for the other prisoner, and he deposed that he shot the cow, and brought it to the prisoner's house where it was consumed. The jury accordingly found that the prisoner feloniously received a dead beast; and I think that on this information that finding can be sustained.

The present is no decision, that if it had been a count for stealing a cow it would have been sufficient to prove the stealing of a dead one, for the stealing a cow alive or dead is a different offence. But where the offence charged is a receiving, it is immaterial whether the cow be alive or dead.

Conviction sustained.

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1863.

March 8, 1864

An inspector of cattle appointed under the provisions of the Cattle Disease Prevention Act, has no power under the fourth section of the Act, to seize horned cattle introduced into the colony, contrary to the proclamations or regulations established in pursuance of the Act.

PIERCE *against* BRUCE.

THIS was an appeal from the District Court, at Albury.

It was an action tried before Mr. District Court Judge *Blake*, on July 21, 1863. The particulars of the plaintiff's claim annexed to the summons were, in trespass, detinue, and trover, for seizing and detaining ninety head of horned cattle. The defendant pleaded not guilty, by statute 24 Vic., No. 11, sect. 4. The appeal case stated that "it was proved that plaintiff had bought 270 head of cattle from one *Brown*, in Victoria, about June, 1862, to be delivered at the plaintiff's station in New South Wales—that the cattle were delivered on June 27; that the defendant saw them in October, on the plaintiff's station, and said that they were all right; but that in November, he saw them again, and summoned the plaintiff to the Court of Petty Sessions, at Albury, charging him with assisting to cross those cattle at a place unauthorised by the Act; and that the case was dismissed by the magistrates. The defendant then went and seized ninety of these cattle, and took them from the plaintiff's run to Tumberumba, and left them in charge of the poundkeeper; and that three weeks afterwards the defendant took these cattle to Ten Mile Creek and put them in his paddock, where they still remain."

It appeared that the cattle were seized and detained by the defendant as inspector under the Cattle Disease Prevention Act, not on any suspicion of their being diseased, but for having been crossed over the river Murray at an unauthorised spot, and without any certificate that they were not diseased, as required by the proclamation of May 9th, 1862 (a).

(a) This proclamation of 9th May, 1862, after reciting the Cattle Disease Prevention Act, "prohibited the introduction into the colony of any horned cattle from Victoria, for and during the full term of six calendar months, to be computed from the date of this proclamation,

It was conceded that the cattle were so crossed over, and the owner of the cattle did not produce or allege that he had obtained any certificate. But the learned District Court Judge ruled that even assuming that the seizure was rightfully made, by the fourth section of 24 Vic., No. 11, the cattle so seized were to be treated as contraband goods, and required to be dealt with under the Customs Act, 9 Vic., No. 15, which was not done in this case, and that upon a demand of the cattle and refusal, which were proved, the plaintiff was entitled to maintain the action, and gave a verdict for the plaintiff.

Darvall, Q.C., for the appellant. The legality of the seizure does not appear to have been questioned in the Court below. But, at all events, the seizure was legal; for all cattle brought in contrary to the proclamation are, under the fourth section of the Cattle Disease Prevention Act (*a*), to be treated as contraband goods; and if it was legal, as nothing has been done to revest the cattle in the original owner, the present action is not maintainable. A seizure by some one is contemplated by the Act, and the inspectors are the proper officers to seize. [*Wise*, J. I should doubt whether his appointment as inspector would give him power to seize. Must he not be appointed an officer of Customs?] The statute says that they may be seized. Why should not every one have power to seize? The statute imposes the duty on every one to carry out its provisions. If the seizure were legal, it matters not that the defendant is not the proper officer to detain or condemn. And if the cattle except only such horned cattle as may cross the river Murray at one or other of the undermentioned places, and shall have been there examined by an inspector or officer duly appointed in that behalf by the Government of New South Wales, and certified by such officer to be free from such disease—that is to say, at Albury, at Moama, at Tower Hill, and at Euston respectively.” The proclamation then notified in the words of the statute, that “in pursuance of the provisions of the said Act, all horned cattle imported into the colony contrary to this proclamation, may be seized and shall be forfeited in like manner as any contraband goods liable to be seized and forfeited under any Act relating to the Customs.”

(*a*) 24 Vic., No. 11. The fourth section is, “All horned cattle imported or introduced into the colony, contrary to any such proclamation, or to any regulation established thereby or thereunder, may be seized and shall be forfeited in like manner as any contraband goods liable to be seized and forfeited under any law relating to the Customs.”

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were brought over without the requisite certificate, the present action cannot be maintained. The onus of proving that a certificate had been obtained, was cast on the plaintiff.

Isaacs for the respondent.

STEPHEN, C. J. I am of opinion that the verdict must be maintained. The Act enables the Governor by proclamation, to prohibit the introduction into the colony from any specified place, and for any specified time, of any horned cattle; and to authorise the destruction of such cattle as may be introduced contrary to such prohibition; and also to make regulations for preventing the introduction or propagation of any disease among cattle, either by submitting them to quarantine, or by destruction of them or their food. But there is nothing in the Act authorising a regulation for their seizure or detention. It may be that the Governor has power to appoint inspectors, but can he appoint some one else to appoint inspectors? In *Hall v. Gibson* (a), it was decided by this Court, that Her Majesty, having an authority given by statute, could not delegate to the Governor of this colony the exercise of that authority. I entertain some doubt, therefore, whether the appointments of these inspectors are legal. But, assuming such appointments to be legal, the inspectors cannot destroy cattle because they are taken across the Murray at unauthorised places, but only those suspected of being infected. The defendant had no authority to seize cattle because they had crossed the river at an unauthorised place. The proclamation of March 21 says, that the inspectors and their assistants "shall have power to enter upon any land, or any run, for the purpose of examining the horned cattle thereon, and subject to the instruction of the Minister for Lands, to slaughter and destroy any cattle found to be, or suspected to be infected with the disease known as pleuro-pneumonia." Assuming the inspector to be lawfully appointed, he is hereby authorised to examine horned cattle and destroy

(a) 3rd November, 1858.

those suspected of being infected. In this case he has not seized the cattle, because he supposed that they were infected. The next proclamation of May 9, recites that the Governor has power under the Act, to prohibit the introduction of any horned cattle, and to authorise the destruction of any such cattle as may be introduced, contrary to such prohibition. But it does not go on to exercise that power. The fourth section provides that the cattle "may be seized and shall be forfeited" as contraband goods. And, therefore, they were certainly, although in the hands of an innocent owner, liable to forfeiture, but no more.

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WISE, J. I am of opinion that the plaintiff has a good cause of action. He had cattle on his station; and the defendant having taken them away, has justified their seizure on the ground that he was an inspector of cattle, and that these cattle had crossed the river Murray at an unauthorised place. I know of no statute giving the defendant such a power. The words of the fourth section of the Cattle Disease Prevention Act are, that cattle imported into the colony contrary to the proclamation, "may be seized and shall be forfeited in like manner as any contraband goods liable to be seized and forfeited under any law relating to the Customs." These words provide—not that they may be seized by any one, or by the inspector, but that they may be dealt with as contraband goods; in other words, no one but an officer of the Customs can touch them. He can do so, and if they are contraband, the onus of proving that they are not liable to forfeiture is thrown on the person with whom they are found. In any other construction of these words, the cattle would be liable to be seized by any one. A construction so repugnant to the rights of the subject, and under which any person's cattle might be seized by any one without the owner being able to resist, would require very strong words. Unless the words are so clear as to leave no alternative, they must be construed so as to be in conformity with general principles, rather than so as to be opposed to

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them. None of the regulations empower the seizure of cattle merely because they have crossed over at an improper place. I am of opinion that, assuming that the inspectors have been legally appointed, that the defendant had no authority to make this seizure. The remedy would be by appointing each inspector an officer of Customs, and then he could seize them as contraband goods.

Judgment for the respondent.

March 10.

THE QUEEN *against* CHARLES SANDYS PACKER.

In a case of bigamy, it appeared that the first marriage was solemnised in England in 1836, and the second marriage in Tasmania, in 1852. That the prisoner received letters from his family in England up to the time of his second

marriage; and that the prisoner's brother only came out to Tasmania from England, a few months before his second marriage. That he received a letter from his mother, who lived in England in 1851, speaking generally about the family, and of the prisoner's constant neglect of their correspondence; and that statements had been made by the prisoner after his second marriage, justifying or excusing the act on grounds shown to be false, such as that he was married to his first wife at a Portuguese chapel, and merely to save appearances, as she had previously been living with him as his mistress. On another occasion, a woman having asserted in the prisoner's presence, that she could prove that his first wife was alive, the prisoner did not deny that fact, but stated that she had been his mistress. The Judge directed the jury to acquit the prisoner, unless they were satisfied that at the time of the second marriage, he was conscious of the existence of his first wife, looking at his means of knowledge, and the frequency of his communications with his family, and the various untruths which he told concerning his wife and his marriage with her. *Held*, that the direction was right, or at all events was, if wrong, put too favourably to the prisoner, as assuming that the onus of proving that he knew of his wife's existence lay on the Crown.

Held also, that there was sufficient evidence to support the finding of the jury in favour of the Crown.

Held, per Wise, J., that the onus of bringing him himself within the proviso of sect. 22, of 9 G. IV., c. 31, lay on the prisoner.

Held also, that the Supreme Court had jurisdiction to try the case, under 9 G. IV., c. 83, sect. 4.

In reserved criminal cases, only one counsel will be heard on either side.

Mary Frances Moore. To prove this first marriage, certain statements or admissions by the prisoner, made in this colony in 1855, to Mr. *John Dillon*, were relied on. Mr. *Dillon* stated that he had been professionally employed to see the prisoner by a person in Ireland, on Mrs. *Packer's* behalf. It was then objected that Mr. *Dillon*, therefore, could give no evidence at all against the prisoner, as he must necessarily be considered the latter's attorney. He had not been employed in any way by the prisoner, in point of fact, and he was not even employed by the prisoner's wife; and Mr. *Dillon's* statement, moreover, that he had been employed on her behalf, was objected to. On what grounds, therefore, I could have rejected Mr. *Dillon's* evidence I am utterly unable to comprehend.

Second. In detailing the conversation between himself and the prisoner, Mr. *Dillon* stated that he produced and showed to the latter, a certain paper, partly written and partly printed, which purported, in fact, to be a certificate of marriage, which paper the witness put into the prisoner's hands for perusal. He said that prisoner looked at it, and after having had it in his hands long enough for that purpose, handed it back again, saying to the witness, "Yes, that is true." The reading of this certificate or paper to the jury was objected to, on the ground that no proof had been given of its authenticity. I received it notwithstanding, not as a certificate, nor as a genuine document of any kind, but simply as a matter incorporated in and forming part of the conversation which, without reference to the contents of the paper, would have been unintelligible. I must add that, had that evidence been rejected, there was evidence of a conversation between another witness and the prisoner, in which the same admission of his marriage to *Eleanor Mary Theresa Grogan* was made by him.

Third. To prove a similar admission by the prisoner of his first marriage, a letter in his handwriting, and signed "Charles S. *Packer*," was produced by William *Bugle*, who said that he got it from Mrs. *Packer*, recently in this colony. The witness was speaking to the

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prisoner respecting his wife, having had two or three previous conversations with him on the same subject, and as to his second marriage, the witness put the letter in question into the prisoner's hands. It was addressed to Mrs. *Holloway*, and spoke to her in terms of affection and respect of a person therein called *Ellen*, and supposed to be his wife *Eleanor*. The prisoner, looking at the letter, mentioned that Mrs. *Holloway* was his sister. The reception of the letter was objected to, but I received it, and am still unable to see why it should have been rejected.

Fourth. After the giving of the evidence already mentioned, *Mary Frances Moore* was called. Her evidence was objected to on the ground that his first marriage had not been sufficiently proved.

Fifth. Miss *Moore* stated, among other things, that the prisoner had on different occasions spoken of his family at home, and mentioned that he had received letters from them, and that he once gave her a letter dated London, 1851, which he said was from his mother. I allowed this letter to be read. It was offered against the prisoner as tending to show that he must have known from his own family of the continuing existence of his wife. It struck me that if the prisoner had orally said that his mother had in 1851 told him such and such things, that oral matter would necessarily have been receivable; and it seemed to me to make no substantial difference that the prisoner put into Miss *Moore's* hands the letter from his mother, which, in fact, contained those things in writing; the second marriage was in August, 1852.

Sixth. Miss *Moore* said that some years ago, she requested the prisoner, in consequence of reports in this colony about her connection with him, to write to Tasmania and obtain a certificate of the marriage. She said that the prisoner afterwards told her that he had done so, and that a paper which he gave her was the certificate that he had procured. I allowed this paper accordingly as a paper coming out of the prisoner's own hands, and stated by him to be a certificate of their marriage to

be read. I did not receive it as a genuine document, but simply as a paper which the prisoner said was one, and therefore, as in effect equivalent to an oral admission by him.

Seventh. It was objected at the close of the case for the Crown, that there was no evidence of the prisoner's knowledge of his wife's continued existence at the time of the second marriage. I held that there was evidence enough on this point to go to the jury. Much more than seven years had elapsed, no doubt, during which the prisoner's wife *Eleanor* had been in England or Ireland, before the second marriage took place. But there were the following circumstances shown as to knowledge.

1. The fact that the prisoner continued in correspondence, or at least received letters from them, up to the time of his marriage with *Mary Moore*, it being shown by his letter to his sister that the latter, at all events, knew the first wife, and it being proved that she frequently visited London, where the prisoner's family resided.
2. It was sworn by Miss *Moore* that the prisoner's brother came out from England to Hobart Town only a few months before the second marriage; and there was the mother's letter of 1851, speaking generally about the family, and of the prisoner's constant neglect of their correspondence.
3. There were statements made by the prisoner on different occasions since his second marriage, justifying or excusing the act on grounds shown to be false. Such as, that he was married to *Eleanor Grogan*, at a Portuguese chapel, and merely to save appearances, as she had been previously living with him as a mistress. On another occasion, he said that he had heard his wife *Eleanor* had married again in Italy. He also said that she knew at the time of her marriage, that he (the prisoner) was already married to another woman.
4. According to Miss *Moore*, also, a few days after the Hobart Town marriage, a woman named *Cranston* asserted, in the prisoner's presence (she having been a kept mistress of his), that she had letters in her possession proving that he had a wife at home. The prisoner told *Mary Moore*, in reference to this accusation, that he never had

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been married. It must be added that the prisoner also appears to have been consistent throughout, in asserting that he never heard from or of his wife, from 1841 up to 1853.

In reference to this last point, it should be observed that the law is not settled as to the onus of proof respecting ignorance of the first wife's existence. I gave no opinion, therefore, on that point, but held that, in determining whether the prisoner was thus ignorant, the jury ought to look at all the circumstances. I told the jury that they were to consider the prisoner's means of knowledge; the facility or otherwise of his acquiring that knowledge; the probability or otherwise of his making inquiry before the second marriage; his conduct generally in reference to the second marriage; and all other circumstances in the case which might enable them to conclude, whether in truth and in fact, he was ignorant of his first wife's continued existence, or was really conscious of her being alive, but determined, nevertheless, to obtain, by a second marriage, the person of another woman.

The cases on the subject are the following:—1 C. & K. 164; 2 C. & K. 782; 1 Dears. & B. 98 & 104; 9 Cox C. C. 165; 1 F. & F. 309, 323, 510.

Eighth. After the verdict, I announced that I should reserve also the point following of my own authority. The statute of Geo. IV., c. 31, which contains the enactments in force in this colony on the subject of bigamy, was applied to the colony of New South Wales and Tasmania by the Act of the British Parliament, 9 Geo. IV., c. 83, s. 24, being the general extending section applicable to both colonies. But it occurs to me as deserving consideration, whether the effect of that statute, 9 Geo. IV., c. 31, s. 22, so extended to New South Wales as aforesaid, makes the offence of marrying a second time in Tasmania, for instance, cognizable and punishable in New South Wales. I submit this question for the opinion of the Court, together with the others which were raised at the instance of the prisoner's counsel.

ALFRED STEPHEN."

The special case stated that the two papers or documents spoken of as certificates of marriage respectively, could be referred to if necessary, and copies of two letters were annexed; one from the prisoner to his sister, Mrs. *Holloway*, dated Spithead, November 16th, 1839, which, after bidding her good bye, and expressing in grateful and affectionate language, his gratitude to her for her kindness to himself and *Ellen*, contained the following extract:—"I have no doubt poor dear *Ellen* will be pleased to explain to you fully. She has been allowed to visit me very nearly every day since she has been down here, and has been treated with the most marked kindness by all. You mentioned in your kind letter to me, what a happiness you experienced in having so kind and good a husband as yours is; you will the more readily, therefore, enter into her feelings at losing him who, whatever he has been in the eyes of the world, has been in hers only the object of the most devoted love and affection. Poor dear girl, I need not, I am sure, ask you to be kind to her for my sake." The other from the prisoner's mother to him, dated London, August 26, 1851, enclosed another letter containing family news, which was not produced. This letter referred to the prisoner's neglect in answering several letters, and his father's and mother's consequent anxiety. It ends by saying, "As the enclosed letter contains all our family news, I must conclude with our united love. Hoping soon to hear from you, I remain, my dear *Charles*, your affectionate mother, *A.P.*"

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Isaacs for the prisoner. It is submitted that where the wife has been absent for more than seven years, the onus of proving that the husband knew of her existence lies on the Crown. Assuming that before the expiration of the seven years, a prisoner is bound to shew that he did not know of the existence of his first wife, it is contended that at the end of seven years, the inference of death arises; and, there being a presumption that the prisoner does not know that she is alive, the Crown must

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rebut that presumption. *Briggs'* case (a) is a distinct authority that it is not sufficient that the prisoners should possess the means of knowledge. Where the only evidence of the first marriage has been the admissions of the prisoner, the jury, although the evidence has been left to them, have always been advised to acquit. *R. v. Simonsto* (b), *R. v. Flaherty* (c), *R. Cross* (d), *R. v. Ellis* (e), and *R. v. Dane* (f), were referred to. It is submitted also that the difficulty suggested by the learned Chief Justice, who tried the case, is fatal. The alleged offence is not an offence against the law of this colony, but only an offence against the law of Van Diemen's Land or England; and it is cognizable, therefore, only by the Courts of those places. If the prisoner, after his present sentence was expired, went to that colony, he would be liable to be tried again for the same offence, and could not plead *autre fois convict*; and he would also be liable to be tried again if he went to England. *Hall v. Campbell* (g) was referred to. [*Wise*, J., referred to *R. v. Ross* (h).]

Powell, on the same side, claimed to be heard.

Per Curiam. Only one counsel can be heard. In a special case, *Cook v. Briggs* (i), we refused to hear more than one counsel; and in special criminal cases, we now lay down the same rule.

The Attorney-General, for the Crown. The conviction in *Briggs'* case was quashed, because the jury found that there was no evidence of the prisoner's knowledge. It is submitted that all matters contained in the proviso must be proved by the prisoner, with more or less precision, according to the circumstances of each case. The circumstances which would justify a jury in finding that the prisoner had that knowledge, must vary with the circumstances of each case. The law requires the best

(a) 1 Dears. & B. 98; 26 L.J.M.C. 7.	(c) 2 C. & K. 782.
(b) 1 C. & K. 164.	(e) Id. 309.
(d) 1 F. & F. 510.	(g) Cowp. 204.
(f) Id. 323.	(i) December 21, 1861.
(h) 1 Sup. Ct. R. App. 43.	

evidence that can be obtained, but does not exact impossibilities. Some circumstances might be proved by the prisoner, which would throw the onus on the Crown. Where the prisoner had lived in this colony and his wife in England, it may be that the Crown would be bound to show that the prisoner had the means of knowledge. But here, just before the second marriage takes place, it is shown that the prisoner stated that his first wife had been his mistress, and that he had only gone through the form of marriage to satisfy her conscience ; and he thus showed that he knew of her existence, and stated what was untrue, in order to lull suspicion. The letter of August 26, 1851, shows that his family had frequently written to him and received no answer. Evidence of the means of knowledge is clearly admissible as one of the circumstances which would justify the jury in finding that he knew that she was alive, and coupled with the prisoner's conduct, was cogent evidence that he had this knowledge. *R. v. Cullen* (a), *R. v. Jones* (b), and *East's P. C.* (c), were referred to.

STEPHEN, C.J. I think that none of the objections to the reception of any of the pieces of evidence were well founded. The substantial question is, whether there was sufficient evidence to justify the jury in finding that the prisoner knew that his first wife was alive at the time of the second marriage. Under the statute, not only must the wife be absent from her husband for seven years, but the prisoner must not be aware that she is alive. How could that be proved more effectually than by showing that the prisoner had the means of knowledge—not only from persons on the spot writing to him on the subject, but from his own brother, who came out from the place where she lived ? It must be supposed that the prisoner was interested in knowing whether his wife was alive. Having, then, such means of knowledge, it is probable that he would use them ; and these circumstances are surely sufficient to justify the jury in finding that he knew that she was alive. It was proved that a

(a) 9 C. & P. 681.

(b) C. & Marsh. 614.

(c) Vol. 1, p. 467.

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few days after the second marriage, a woman named *Cranston* asserted, in the prisoner's presence, that she could prove that his first wife was alive; and that the prisoner did not deny that such was the case, but said that the woman referred to as his first wife had been his mistress. I think my charge to the jury was correct, or at all events, if wrong, put the case too favourably to the prisoner. It assumed that the onus of proving that he knew of his wife's existence lay on the Crown, whereas it seems to me doubtful whether the onus is not wholly on the prisoner. I told the jury to acquit the prisoner unless they were satisfied that at the time of the second marriage he was conscious of the existence of his first wife, looking at his means of knowledge, and the frequency of his communications with his family, and the various untruths which he told concerning his wife and the marriage with her. The doubt that I suggested at the trial has been removed, by further considering the words of the statute creating this offence, 9 Geo. IV., c. 31, s. 22, which, by the 9 Geo. IV., c. 83, was incorporated in our laws, and which is, therefore, the law of the colony. If an enactment of that nature had been passed by a colonial legislature, I should have thought that it would have no force as to marriages contracted elsewhere than in the colony so legislating. But the British Parliament has legislative authority over all the colonies; and I think, therefore, that the Courts of this colony have jurisdiction over this offence.

MILFORD, J. The conviction must be upheld. I do not know whether I should have found the same verdict. But there was sufficient evidence for the jury to find that the prisoner knew that his wife was alive. I should have had some doubt as to the statute being in force in this colony, but there are decisions of this Court to the effect that these inconsistencies of language are not sufficient to prevent their being in force, and that the word "England" must be read as if it were "New South Wales."

WISE, J. I am of opinion that there was no misreception of evidence, and no misdirection. There was no misreception of evidence, because all the evidence which was received went to show a state of circumstances which would, with the other evidence, guide the jury to a decision of the question, as to the ignorance or knowledge of the prisoner, of the existence of his first wife at the time of the second marriage. It does not follow from this, that every imaginable fact would be admissible, but if the fact is shown to be such as to assist the jury, it is admissible. The only doubt I felt was with regard to the letter from the mother. The first marriage being proved, and the fact that the first wife was still alive, it was proved that the prisoner was in communication with members of his family. It is contrary to all probability, therefore, to suppose that the prisoner would not have enquired for, or that they would not have told him of her death, if she were dead; and that evidence, therefore, shows that the prisoner was conscious of her existence. I am of opinion, that the question was left to the jury in a way favourable to the prisoner, when they were directed that the prisoner was guilty, if it was shown that he knew of her existence, although he had been absent for seven years. The question is, whether it might not have been left in a way more unfavourable to the prisoner. I think the facts contained in the proviso must be shown to exist; that is, it need not be proved negatively not to exist. Suppose a prisoner is proved to have been married twenty years ago, and after fifteen years to have married again, his first wife being alive at the time, and there being no evidence as to where the prisoner and his first wife had been living, I should think that that evidence would be sufficient to support a conviction for bigamy. The statute says, that if any person being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, he shall be guilty of felony. I think that those words define a complete offence; but the statute goes on to say, "provided always, that nothing herein contained shall extend

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to any second marriage contracted out of England, by any other than a subject of His Majesty or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time ; or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage ; or to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction." Could it be contended that the Crown must negative the existence of any divorce ? If not, why must it negative any of the other branches of the proviso ? It has been held in cases under the Game Laws, that it is not necessary for the prosecution in such cases, to negative the possession by the defendant of the necessary qualification. I am of opinion, therefore, that the prisoner was bound to bring himself within the proviso ; and such seems to have been the opinion of Coleridge, J., in *Briggs's* case. Here the jury have found that the prisoner was guilty, and I think that the facts before them in evidence, were sufficient to justify that finding. I am of opinion, also, that the prisoner can be punished here, although the offence is, in fact, committed in Van Diemen's Land ; and, therefore, that if he were tried again, either there or in England, for the same offence, he could plead *autrefois convict*. Legitimacy is a question of importance to a British subject, wherever he might be, and the law of England on this matter would govern the subject wherever he might be. As, for instance, it has been decided that the marriage of a widower with his deceased wife's sister, both being British subjects, and domiciled in England, is absolutely void, although the marriage was celebrated in a foreign country, by the law of which such a marriage was legal ; *Brook v. Brook* (a).

Conviction sustained (b).

(a) 9 H. L. Cas. 193 ; 7 Jur. N. S. 422.

(b) The following is the marginal note given by the reporter of a recent decision of the Supreme Court of Victoria :—

"On the trial of *Margaret S.* for bigamy, her father *N. M.*

McISAACS *against* ROBERTSON.

March 11.

THE first count of the declaration for slander, charged that defendant spoke and published of the plaintiff the words following: "You are a false swearing old vagabond; you robbed me, and you will rob everybody you have to do with; you will rob that man (meaning one *George Best Kelly*) before you have done with him." Action for slanderous words. The first count of the declaration alleged that the defendant spoke of the plaintiff, "You are a false swearing old vagabond; you robbed me, and you will rob everybody you have to do with; you will rob that man (meaning G. B. K.) before you have done with him." A second count alleged that defendant said of the plaintiff, "You are a false swearer and swindler; you swindled me, and you will swindle them too," (pointing to G. B. K., and meaning G. B. K. and his brother).

The plea to the first count stated, that the plaintiff induced the defendant to lend him his name to a promissory note, on the fraudulent representation that the plaintiff had goods in a yard which were unencumbered, whereas the goods were then under mortgage, as the plaintiff knew, and that the plaintiff was insolvent; and that the result was, that the defendant had to pay the promissory note and lose his money.

The plea to the second count, after setting out the same facts as were set out in the first plea, stated that in an examination before the Chief Commissioner of Insolvent Estates, the plaintiff committed perjury. Both pleas contained the allegation that the plaintiff was about to have business transactions with G. B. K., and that by reason of the facts stated in the plea, it was for the public benefit that the words complained of should be spoken. *Held*, no sufficient justification under the Injuries to Character Act, 11 Vic., No. 13, sect. 4.

gave the following evidence—"I am a Roman Catholic, and the marriage was performed again by Father C., a Roman Catholic priest, in a house where prayers were said. There was no Church built. I know the ceremony of my own Church, and it was performed. Mr. and Mrs. S. (the latter the prisoner) lived together for thirteen years. They took each other for man and wife. I cannot say what was said, because it was in Latin. I am not certain whether there was a ring. The Judge was asked to direct an acquittal, but refused. The jury found a verdict of guilty, but by a rider made a strong recommendation to mercy, on the ground that the prisoner had, shortly before her second marriage, received a letter informing her of her husband's death. On questions of law reserved, that the marriage was not proved, and that the rider made the verdict equivalent to 'not guilty.' *Held* by *Stawell*, C. J., and *Molesworth*, J. (*Williams*, J., dissenting), that there was sufficient evidence of the first marriage; and, by *Stawell*, C. J., and *Molesworth*, J. (*Williams*, J., expressing no opinion), that the verdict of 'guilty' was properly found.

Per *Stawell*, C. J. Seven years is the limit within which a second marriage is entered into at the risk of the party who ventures to marry again without full knowledge of the death of the first husband or wife.

Per *Molesworth*, J. Knowledge within seven years is not a necessary ingredient of the offence of bigamy; the act which constitutes the bigamy is the second marriage; and the question as to whether, when that second marriage is entered into by the parties, their *status* is such as to make it criminal, is one on which they must be informed at their own peril, so far as being liable to conviction; *Reg. v. Smith*." (*)

* *Wyatt & Webb's Rep.* C. L. 225.

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The second count charged that defendant spoke and published of the plaintiff the words following: "You are a false swearer and swindler; you swindled me, and you will swindle them too," (pointing to one *George Best Kelly*, and meaning the said *George Best Kelly* and his brother).

Plea, as to the slander in the first count complained of, and as to the following words in the second count complained of, "You are a swindler; you swindled me and you will swindle them too," alleged that before the speaking, &c., the plaintiff requested the defendant to indorse for the plaintiff's accommodation, a certain promissory note then made by the plaintiff for £45, and in order to induce the defendant to indorse the promissory note, the plaintiff falsely and fraudulently represented to the defendant that a quantity of timber then in the yard of the plaintiff, was clear of all charges and incumbrances, and the plaintiff promised that he would pay the note at maturity. The plea then alleged that the defendant, relying on the plaintiff's representation and promise, did endorse the note; and having discounted it, handed over the proceeds to the plaintiff. It then stated that the timber was not clear of all charges and incumbrances, but was then included in a certain mortgage, &c., as the plaintiff knew, and the plaintiff was then insolvent, as he well knew. The plea then averred that plaintiff's estate was duly sequestrated, and that before such sequestration, the defendant, as the indorser, was obliged to pay the promissory note, and suffered loss. Averment, that after the sequestration the plaintiff was about to have business transactions with *George Best Kelly*, in the declaration mentioned; and that by reason of the facts in this plea stated, it was for the public benefit that the words in the introductory part of this plea mentioned should be spoken and published of the plaintiff, wherefore the defendant did speak and publish the words in the introductory part of this plea mentioned, as he lawfully might for the cause aforesaid.

The second plea as to the words, "you are a false swearing old vagabond," in the first count, and as the

words, "you are a false swearing," in the second, stated, that before the speaking, &c., the defendants, at plaintiff's request, and for his accommodation, endorsed a promissory note for £45, which he discounted, and handed the proceeds to the plaintiff; and that after the endorsement, and before his insolvency, the plaintiff showed to the defendant a roll of bank notes, and stated to the defendant that there were £700 in the roll, and that he could then pay the promissory note, but that there were other claims he wished to pay. It then alleged as in the first plea the plaintiff's sequestration, and that the defendant was compelled to pay the note, and prove against the plaintiff's estate. The plea then stated that, pending such sequestration, the plaintiff was duly examined upon oath before the Chief Commissioner of Insolvent Estates, touching his estate; and that upon such examination the plaintiff swore that he did not show the said roll of notes, or any roll of bank notes to the defendant—and that he did not state that there were £700 in the roll—and that he did not allege that he could then pay the said promissory note—but there were other claims, &c., or anything to that effect. Averment, that after such sequestration and examination the plaintiff was about to have business transaction, &c., concluding with the same words as the second plea.

Demurrer and joinder.

Isaacs in support of the demurrs. The plea contains no averment that the facts alleged as a justification of the speaking of the words are true; and the facts do not show that it was for the public benefit that the words should be spoken. It cannot be for the public benefit that *A.* should tell *B.* that *C.* has cheated him. And the second plea is also defective, because it does not allege that what the plaintiff swore before the Chief Commissioner of Insolvent Estates was false.

Darley in support of the plea. The word public must be construed in a limited sense. The law considers that defamatory matter is published or made public if

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communicated to one person ; and it is submitted that a matter can be spoken for the public benefit, although not beneficial to the whole community. It is sufficient that it is for the benefit of a member of the public. The public are interested in knowing the integrity of persons with whom they deal ; and it is for the public benefit that a person recently engaged in swindling should not obtain credit. The pleas show a *prima facie* case for the jury, which is all that is necessary on the face of the record.

STEPHEN, C. J. I have no doubt that the pleas are bad. The statute says that one man may not say things defamatory of another man, however true it may be, unless such publication be for the public benefit. Are there any grounds for saying that there is shown here a *prima facie* case of benefit to the public by the uttering of the words set out in the declaration ? The decision must depend upon the circumstances of each case, and to illustrate the application of this principle I will refer to some of the cases in which this question has been considered by this Court.

Floyd v. Taylor (a) was a case of libel imputing to the plaintiff that he was absconding from his creditors. The plea justifying the publication under the statute was held good, on the ground that the allegations in the libel, which were all justified, show sufficiently in themselves grounds for the publication for the public benefit.

The case before that was *Maister v. Hipgrave* (b), which was an action against the publishers of a newspaper for a libel reflecting on the plaintiff as a magistrate, imputing corrupt, partial, and prejudiced conduct—but chiefly in conniving at the absences and misconduct, and partiality of the clerk of the bench under whose influence he was said to be. The defendants pleaded a justification of many portions, on the ground of the truth of the imputations, and that it was for the public benefit that they should be published. The plea was demurred to, on the ground that the latter averment was defective,

(a) June 28, 1861.

(b) December 13, 1859.

and that some passages pleaded to were not justified at all ; and also that some passages were excluded which ought to have been added, in order to make the sense and substance of the charge complete—that in short the extracts were garbled. After argument, we held in a considered judgment that the plea was bad, for not containing any statement justifying some particular instances (indeed the plead did not even notice them), which were adduced in the libel of the clerk's influence over the plaintiff. But we also held that the plea was not objectionable, on the ground of the extracts being garbled, considering that it would be a question for the jury how far the charge of corruption was conveyed by the publication ; and on the question of public benefit we held that the various allegations of the clerk's misconduct, and of his influence over the plaintiff, were all in effect matters which made, or which tended to make, and might in the opinion of the jury make, it for the public benefit that the matters should be published. There are cases in which the facts themselves which are published may, always assuming them to be facts, show a sufficient justification for their publication, in a view to the public benefit.

Again, in the case of *Morgan v. Irby* (a), the libel declared on was contained in two letters—the first addressed to the Postmaster-General, imputing to plaintiff that he had been tried for feloniously receiving gold dust, stolen from a mail—and that the jury did not acquit him, but was discharged without verdict ; and the second letter addressed to Mr. S. A. Donaldson, imputing that he had been guilty of perjury on a certain occasion. The second plea justified the former charge by alleging its truth ; and stated, as a reason why the publication was for the public benefit, that the postmaster of the place, wherein the plaintiff resided, was the plaintiff's son-in-law, and his near neighbour, and in constant communication with him—and that such connexion was likely to be injurious to the public. And there was another plea which justified the second of the two charges

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In *Armstrong v. Parkinson* (a), the defendant had published a libel of the plaintiff, who was a postmaster, in a letter to the Postmaster-General, and on a demurrer to a plea of justification we decided the following points. That it is necessary, not only specifically to allege the facts which make the publication for the public benefit, but to state that they rendered it so ; e.g. in that case, that the publication was for the public benefit, because the plaintiff was a subordinate postmaster, and the party addressed was the head of his department, and that the letter was for correcting the grievance complained of by or through him. And as it appeared and was alleged that the defendant charged the plaintiff with being guilty of improper conduct in charging three different sums on three letters from Appin to Deniliquin, the plea should have shown the circumstances which made the said charges improper. And in *Holroyd v. Parkes* (b), the same principles were laid down.

In the case which is now under consideration, I do not see how it can be for the public benefit that the plaintiff should be told of himself, in the presence of two persons, with whom it may be the plaintiff was about to have some business transactions, or that those two persons should have been told of him, that on some former occasion he had been guilty of swindling, or robbery, or perjury. It might be for the benefit of those two persons to know the plaintiff's character ; but how is it for the public benefit ? How could the public, by any possibility, be benefited by such publication ? I think there is no circumstance to go to the jury from which they could be allowed to form an opinion that it was for the public benefit, that these two persons should hear that the plaintiff had been guilty of swindling. If it were for the public benefit that two persons should be told these things, it would be equally for the public benefit that one person should be told, and the statute would be completely frittered away. I am of opinion that the statute must be fairly construed, so as to put down slander, whether true or false, unless the public generally, who are interested in the publication, can be benefited thereby ; and the public cannot be benefited in a case like the present.

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WISE, J. I am of the same opinion. I think this statute is prejudicial to the public interest. The evils which it was intended to guard against, might be remedied by allowing the plaintiff to reply to a defence that the defamatory matter is true, that it was said *malo animo*. I may add, that in Victoria, this statute has been repealed, and the law there is the same as in England.

Judgment for the plaintiff.

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October 29,
1863.August 6,
1864.CAMPBELL and another *against* DENT.

Trespass for
entering land
and carrying
away trees and
timber there-
from. Plea,
that the land
was granted by
the Crown,
subject to a

reservation out
of the same of
(*inter alia*) all
stone, gravel,
indigenous
timber, and
other materials
required for
naval or public
purposes; that
certain in-
digenous tim-
ber and other
materials were
required for
making a pub-
lic road; and
that the de-
fendant being
authorised by
the Crown,
entered on
the land and
took away that
timber and
those materials
for that pur-
pose.

Held,

on demurrer
that, assuming
that the stated
reservation em-
braced the trees
and materials
in question,
and that the
defendant
really had due
authority from
the Crown for
the acts per-
formed by him,
the plea was
good.

TRESPASS for breaking and entering certain lands
of the plaintiffs' described in the declaration, and
cutting down divers trees growing, and fences being,
thereon—and carrying away the same and erecting tents
and stockyards on the land, and depasturing the same
with horses and cattle.

Plea, except as to erecting tents and stockyards, and
cutting down fences on the land, and depasturing the
same with horses and cattle, that the land is certain
land conveyed by deeds of grant from the Crown to the
plaintiffs, or to those from whom they claim and whose
estate they have; and by the deeds of grant respectively
there were and are reserved to the Crown out of the land
a right of way or ways, all stone, gravel, indigenous
timber, and other materials required for naval or public
purposes, to wit, for making a public road; and that
the defendant being duly authorised by the Crown,
entered on the land and took and carried away certain
indigenous timber and other materials—the same being
then required for public purposes, to wit, for making a
public road, which, except as aforesaid, are the alleged
trespasses, &c.

Demurrer and joinder.

Sir W. Manning, Q. C. (*Stephen with him*), in sup-
port of the demurrer. The reservation is altogether bad,
even if restrained to timber growing on the land at the
time of the issue of the grant; and the plea is therefore
bad, for not alleging that the timber taken by the de-
fendant was so growing, and also for not showing that it
was taken for purposes which the Court can see are
public purposes, and which must be *ejusdem generis*
with those specified in the grant. The plea merely
alleges that the indigenous timber and other materials
were required for public purposes, to wit, for making a

public road. But the reservation in the grant is, when "required for naval or public purposes." The question is, what are the public purposes intended; are they all conceivable purposes? Are they those of the Queen and her government anywhere and everywhere? Surely it cannot embrace mere local improvements like roads. At all events the plea should have shown that the road, for repairing which this timber was taken, was one of the main roads, which, by statute, are under the management and control of the government; for surely a parish road, though public in some sense, is not entitled to the use of indigenous timber for its repair. Suppose the entire land granted to be covered with indigenous timber, may the whole be taken? But the reservation is altogether void for uncertainty and too great generality. Is it a reservation of all the then timber? Or of future as well as present timber? Or of planted as well as ornamental indigenous timber? In *Sheppard's* Touchstone (a) it is laid down that a reservation "doth reserve some new thing out of that which is granted. It doth differ from an exception which is ever part of the thing granted, and of a thing in *esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before, so that this doth always reserve that which was not before, or abridge the tenure of that which was before. A reservation must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing." [Stephen, C. J. In *Wickham v. Hawker* (b), in his judgment Parke, B., after stating that the liberty there claimed was not properly and in correct legal language either an exception or a reservation, considered that the words of exception and reservation operated as a new grant by the grantee who executed the deed.] In *Fancy v. Scott* (c) the plea stated that the plaintiff was tenant to the defendant, subject to a "reservation" of all pits in the close, with ingress to cut turf, &c.—and this was held bad for describing an exception as a reservation.

(a) p. 80.

(b) 7 M. & W. 77.

(c) 2 M. & R. 335.

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[*Stephen*, C. J. Are there not several decisions that if an exception be pleaded as a reservation, or a reservation as an exception, the pleading is wholly bad ?] In *Moore v. The Earl of Plymouth* (a) the plea was held bad, because it relied on an exception and reservation in a deed in favour of a person to whom no such reservation could be legally made. *The Earl of Cardigan v. Armitage* (b) is an authority on the same point. If, however, this clause be an exception, the grantee has never had authority to fell a single tree, can it then be upheld in a Court of law ? It is also submitted that the authority of the defendant is not sufficiently shown so as to entitle him to take advantage of the alleged reservation, and justify under it the trespasses complained of. The plea should state by what officer the alleged authority was given. Can any person by the authority of the Minister of Lands confer this authority ?

Sheppard in support of the plea. The reservation extends to all future timber. The distinction between a reservation and an exception is immaterial; for although the word reservation be used, if it can only operate as an exception, it will operate as an exception. [*Wise*, J. In *Doe v. Lock* (c) it was held that exceptions and reservations (so called) from the demise, of timber, trees, mines, and quarries, were exceptions and not reservations. *Stephen*, C. J. In the case of *Lord v. The City Commissioners* (d), where there was a reservation of water for public purposes, we held it to be a valid reservation, and that it might operate (although in a deed poll) by way of regrant from the grantee]. It is also submitted that repairs to any and every public road are public purposes. If the grant either reserves or excepts the trees—and if the plea has stated wrongly the legal effect to be a reservation—that is only a defective statement of our title; it is not a defective title. *Sim v. Edmonds* (e) was referred to.

Cur. ad. vult.

(a) 2 B. & C. 298.

(b) 3 B. & A. 66.

(c) 2 A. & E. 705.

(d) April 1856.

(e) 15 C. B. 241; 23 L. J. C. P. 229.

The judgment of the Court was now delivered by **STEPHEN, C.J.** This is an action of trespass for entering the plaintiffs' land and carrying away trees and timber therefrom. Plea, that the land was granted by the Crown, subject to a *reservation* out of the same of (among other matters) all stone, gravel, indigenous timber, and other materials required for naval or public purposes; that certain indigenous timber and other materials were required for *making a public road*; and that the defendant, being authorised by the Crown, entered on the land and took away that timber and those materials for that purpose. Demurrer, for that the alleged reservation is void for uncertainty; and that it is inoperative—as assuming to “reserve” matters, which are the subject of *exception* only; also, that the plea does not sufficiently show the defendant's authority under the Crown.

Having considered this case in conference with Mr. Justice *Milford*, we are all of opinion that the plea is good. It is certainly by no means so precise in allegation as it might have been; but the substance we conceive to be this—that the Crown, by the defendant, took the trees and timber in question, and therefore necessarily entered on the land and cut down those trees, in order therewith to construct a public road or highway; under a clause in the original grant of the land, by which it is contended that the right to take all indigenous timber, and other materials of that character, *at any time* growing upon or forming a portion of the soil, was reserved to the Crown for public purposes—the making of a highway being one. We assume, therefore, for the purposes of this judgment, that the stated reservation—whatever its legal effect—embraced the trees and materials in question, whatever they were (although, in our opinion, no *planted* trees or *made* soil, would be within the meaning of the clause), and that the defendant really had due authority from the Crown, or, in other words, from the Executive Government, representing the Crown in such cases, for the acts performed by him. So that the only question which remains is, whether the clause in the grant, purporting to “reserve” indigenous timber

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and other materials, conferred a legal right on the Crown to give that authority?

We think that the clause did confer such right. It is unnecessary to consider whether the matters mentioned in it were or are, technically and properly, the subject of reservation or of exception. According to the passage in *Co. Lit.*, 143 a, cited in our judgment in *Edward Lord v. The City Commissioners*, in April, 1856, the former word will sometimes operate as an exception; and, according to the note in *Sheppard's Touchstone* (a), he who takes an interest under a deed, whatever the form, must give effect to the conditions—unless inconsistent with the gift itself—on which that interest was conveyed.

Accordingly, in *Wickham v. Hawker* (b), words both of exception and reservation in a conveyance (the thing meant to be retained being a right to hunt over the lands), were held to be strictly neither, but to operate as the grant of a liberty to the vendors by the purchaser. There had been a similar decision in *Doe v. Lock* (c); but this was a stronger case—for one of the vendors here was a *cestui que trust* only, and so not a conveying party, although a party to the deed. So in *Bush v. Coles* (d), the plaintiff had demised a house, "excepting" a room, with liberty of passage through the house to and from that room; it was held that this amounted to a reservation, for the enjoyment of which the lessee had covenanted—and an action of covenant was sustained against his assignee of the term.

In strictness, no doubt, as observed in Mr. *Platt's* work on Leases (e), citing these and other cases, the stated reservation of timber and the like trees is an exception; while a proviso, that the lessor may cut and carry away the trees, is properly a reservation—amounting to the grant to him, by the lessee, of a newly created easement. An exception of trees, however, not including underwoods and herbage, operates only on so much of

(a) (*Atherly's Ed.*), p. 53.

(c) 2 A. & E. 743.

(b) 7 M. & W. 63.

(d) *Carth.* 232, & *Salk.* 196.

(e) Edition of 1847, pp. 40, 41.

the soil as may be necessary for their support ; and, if the trees are destroyed accidentally, or by the lessor, the soil belongs to the lessee. See the cases cited by Mr. *Platt* (a).

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But the intended reservation or exception, in the present case (independently of the consideration that it occurs in a grant by the Crown), is of a peculiar character. It is not of all indigenous trees, then or thereafter growing on the land, or of all the gravel, &c., forming part of the soil. Only so many and such of these are in terms reserved, as may be required—that is, may be requisite, from time to time—for public purposes. There was, therefore, nothing specific or definite excluded, or sought so to be. The reclamation by the Crown would depend, wholly, on the contingency of the subject matter being found necessary to be used at some future time, for the public service. Until the happening of that contingency, which might never arise, there is nothing in the clause to restrain the most absolute enjoyment of the property. The uncertainty, however, does not, in our opinion, render the stipulation—for such in effect it is—inoperative. The clause, on the contrary, appears to us to be a perfectly valid and effective one.

In the judgment of the Privy Council, on the case of *Mary Lord v. The City Commissioners*, a similar reservation (so called) in a Crown grant to *Simeon Lord*, as bearing incidentally on the rights of the plaintiff in that suit, came under review ; and it is certainly not spoken of as one in any degree open to question. The words in that grant were, “ saving and reserving to his Majesty such timber, growing or to grow upon the land, as may be deemed fit for naval purposes—also such parts of the land as shall be required for a highway ; and further, any quantity of water, and any quantity not exceeding ten acres of land, in any part of the grant, which may be required for public purposes.” After quoting this clause, the judgment proceeds as follows :—“ What is the effect of this reservation ? Ten acres of land in any part of the grant are reserved, at the election of the

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Crown, if required for public purposes. These are not granted to the Crown by *Lord*, but are provisionally saved out of the grant to him. As to the water, *Lord* had no power to grant it to the Crown; and the Crown could grant no property in it to him. The effect of the saving is, only, that he waives his own rights as riparian owner, to the use of it as it flowed" (a.) The question there was only, respecting the resumption of the water; but it seems clear that no doubt occurred to their Lordships as to the validity of any part of the reservation, or exception, even with regard to the ten acres of land.

We may mention also the case of *Jenney v. Brook* (b), in which the defendant had leased to another a farm, excepting all trees, wood, underwood, and bushes, "other than" such bushes as might be necessary for repairing the fences. It was holden that, as there was here nothing definite withdrawn from the exception, the whole of the bushes remained within it, subject to the contingency of some being ultimately wanted for repairs. And Lord Chief Justice *Tindal* says, that the true meaning of the clause was, to preserve to the tenant the right of taking all or parts of such bushes, for repairs, when required. The principle of that decision appears to us to apply here. The case was, in effect, that of a grant to a man of all trees and bushes, other than (i.e., saving or excepting) such of the latter as should be wanted for repairs. The uncertainty of this provision did not avoid it; but, as the question respecting repairs might never arise, and even then it would be uncertain how many bushes were necessary, the whole of them in the meantime passed to the grantee—the other party's right, on the contingency occurring, being reserved.

The result is, that the defendant here will have judgment in his favour, on the plea demurred to.

Judgment for the defendant.

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HALTER *against* MOORE and another.

March 15.

THIS was an appeal by the defendants from a judgment of the Hunter River District Court, holden at Singleton.

The action was brought by the owner of land adjoining a public road, for damage done to that land by the unskilful cutting of a drain in the road, whereby the water there flowing or lodged was thrown on to the said land, to the plaintiff's injury. It was proved that the defendants had employed a person to repair the road, and for that purpose to cut the drain in question—directing him to extend it, as far as would be necessary to obtain a proper fall. They were to pay this person, and they eventually did pay him, for the work thus specified, a stipulated price per yard—he hiring and paying his own labourers, by whom the work was performed. The defendants never interfered, in any way, in the cutting of this drain, or gave any direction whatever respecting it, at any time, other than that which has been stated; its length, subject to the instruction first given, being left to the contractor's judgment. It appeared, however, that this judgment was wrongly exercised; that the drain might and ought to have been carried farther on, to a considerable lower level; and that, had this been done, the mischief complained of would not have occurred.

The defendants tendered evidence to show that they had acted gratuitously on behalf of the public or the government, in expending within their district moneys voted for the repairs of this road; and that the work in question, undertaken under those circumstances for the public benefit, was paid for out of the moneys so appropriated. But the Judge rejected the proffered evidence, on the ground that the supposed facts could not

In an action by the owner of land adjoining a public road, for damage done to that land by an overflow caused by the unskilful cutting of a drain in the road, it appeared that the defendants employed a person to cut the drain, directing him to make a sufficient drain so as to carry off the water, and paid him a stipulated price per yard; and he employed and paid men under him who did the work. The person thus employed by the defendants in the wrong exercise of his judgment, stopt short of the due level and so caused the overflow.

Held, that the defendants were responsible for the injury, although they were acting gratuitously on behalf of the public or

Government, and expending within their district money voted for this work, and although the work in question so undertaken for the public benefit was paid for out of this money.

It is sufficient if an appeal case from a District Court be signed without being sealed.

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relieve the defendants from responsibility, if otherwise responsible for the acts or default of the contractor—and he held that they were so responsible.

The appeal case stated that the questions for decision were—"First. Ought not evidence to have been admitted that shows that the defendants were acting gratuitously in the expenditure of public money for the public good, and that they were not in the position of contractors, but rather of paymasters? Second. Was not the Judge wrong in holding that the defendants were liable for damage caused by the manner in which work was performed by the contractor, to whose management it had been intrusted? Third. Was not the Judge wrong in holding that a person employed to perform work according to his own judgment, at a fixed rate per yard, and who independent of his employers employed men to assist him, was not a contractor, so as to relieve his own employers from responsibility for a nuisance occasioned by the manner in which the work was performed?"

Simpson, for the respondent, objected that Rule 122 had not been complied with, as this case was not sealed with the seal of the Court; and that the appellant had not given the security, or made the deposit as required by the ninety-fourth section. The amount deposited is only £50—whereas the proper sum would be £60 11s. 2d. He also submitted that the case, as transmitted, was unintelligible. [Stephen, C. J. I do not think we should send back a case for amendment, unless an application to that effect has been made in the first instance to the District Court Judge.]

Foster contra. The affidavit does not precisely state that the necessary security has not been given. The affidavit merely states "up to the fifth of March the sum of fifty pounds only had been paid into Court; and I believe no further sum has, since that time, been paid into Court." With regard to the absence of the seal, it is not required by sect. 94, which directs that the case

should be "signed." The rule requiring it to be sealed is inconsistent with the statute in this as in other respects. The former directs that two copies of the case should be sent to the Supreme Court; whereas, by the latter, the case which is signed is to be sent.

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Per Curiam. The appellant has complied with the statute, and so the last objection fails; with regard to the other objection, it is consistent with the affidavit that the necessary security has been since given.

Foster for the appellant. The question is whether the defendants, who are gratuitous agents of the government, acting for the benefit of the public, and expending public money for the reparation of the public roads, are liable for the unskilful or negligent cutting of a drain on the road to the injury of our land; and it is submitted that under such circumstances they are not liable, and that the evidence showing such circumstances ought to have been received. *Sutton v. Clarke* (a) is an express authority that where a man, in the exercise of a public function without emolument, acting without malice and according to his best skill and judgment at the time, and obtaining the best information he can, did an act which occasioned consequential damage to a subject, he was not liable to an action for such damage.

The person who actually cut the drain was employed by the defendants under a contract, and he employed men under him. He was told to make a sufficient drain so as to carry off the overflow; but in the wrong exercise of his judgment, and through negligence, he stopped short of the due level, and so caused the overflow complained of. He, therefore, and not the defendants is liable for the consequential damage. Where a person employs another to do a lawful act, unless the parties stand in the position of master and servant, the employer is not responsible for damages occasioned by the negligent way in which the act is done. In a very recent action for negligently pulling down a wall of the de-

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fendant's house, adjoining the plaintiff's, it was shown that the wall was taken down by a builder at an estimated cost, in pursuance of directions given to him by an architect employed by the defendant, and who had the general superintendence of the wall at the defendant's house; and that in consequence of the removal of the beam from the wall, the front of the plaintiff's house fell down. It appeared also that the plaintiff's house ought, as a reasonable precaution, to have been shored up before the defendant's wall was removed. It was held that on these facts defendant was not liable; *Butler v. Hunter* (a). And in giving judgment *Pollock*, C. B., says—"No doubt, where a thing is in itself a nuisance and must be prejudicial, the party who employs another to do it is responsible for all the consequences that may have arisen; but when the mischief arises not from the thing itself, but from the mode in which it is done, then the person ordering it is not responsible, unless the relation of master and servant can be established." So where the defendant had a statutory authority to construct a drain, contracted with *H.* to do the work, and the latter was guilty of negligence in doing it, in consequence of which the plaintiff was injured, it was held that *H.* and not the defendant was liable; *Gray v. Pullen* (b). In *Hole v. The Sittingbourne Railway Company* (c), where the defendants, although they employed a contractor, were held to be liable, it is clear that the defendants had no right to obstruct the river which was in the nature of a highway, but only to erect a swing bridge which would open; and this not having been done, they were held to be liable for the obstruction. There the mischief arose from the thing done, which was in the nature of a nuisance. The present is no more than the case of a contractor employed to do a lawful act, who is guilty of negligence in doing it—and he alone, therefore, and not the defendants who employed him, are responsible; *Ellis v. Sheffield Gas Consumers Company* (d).

(a) 7 H. & N. 826; 31 L. J. Ex. 214. (b) 32 L. J. Q. B. 169.
 (c) 6 H. & N. 488; 30 L. J. Ex. 81. (d) 2 E & B. 767.

Butler (Simpson with him) for the respondent. Sutton v. Clarke is an authority only where the injury is caused by one who has a statutory duty, which he is bound to discharge, and is inapplicable to a case of a person who merely volunteers to do a wrong. The defendants were trustees of a road, and they employed a person, agreeing to pay so much a yard, not for the specific job ; and they could step in at any time, and control what he was doing, and he therefore was their servant. [*Wise, J.* In *Whitehouse v. Fellowes* (a) it is said, in referring to *Sutton v. Clarke*, where trustees of a road are empowered to do a specific act, such as to raise a road, &c., and in doing so they injure the property of some private person, they are not liable if they do no more than the act of parliament enjoins them to do ; but where the act authorised to be done is done so carelessly and improperly, that the careless and improper manner in which it is done increases or creates the damage, there the trustees are liable. Here he was to make a drain sufficient to carry off the water.] The nature of the agreement shows that the defendants could interfere at any time, and had not parted with all control over him, but left it to his discretion, subject to this control in the first instance, to make the drain long or short ; and the case is therefore within *Burgess v. Gray* (b), and *Bandleson v. Murray* (c), where a warehouseman who employed a master porter to remove a barrel from his warehouse, was holden to be responsible for the negligence of the men employed by the master porter, although the latter used his own tackle and brought and paid his own men. In *Hole v. The Sittingbourne and Sheerness Railway Company* (d), whether all the law on this question is considered, and on which the plaintiff chiefly relies, the rule as laid down by *Pollock, C. B.*, is said to be that where a person employs another person to do an act which the employer has a right to do, it is the

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(a) 10 C. B. N. S. 765; 30 L. J. C. P. 310.

(b) 1 C. B. 578; 14 L. J. C. P. 184; on this see *Knight v. Fox*, 5 Exch. 724.(c) 8 A. & E. 109; See *Allen v. Hayward*, 7 Q. B. 975.

(d) 6 H. & N. 488; 30 L. J. Ex. 31.

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employer's duty to see that the act is properly done—and he is responsible for any mischief arising from the improper performance of the act by the person employed. *Wilde*, B., in the same case, says, the real distinction is that where the accident happens by reason of the negligence of the contractor, so as to cause injury to a third person, there the liability depends on the relation of master and servant; but where the thing contracted to be done is the thing that causes the mischief—in other words, where the injury arises from the imperfectly doing the thing ordered to be done, the person giving the order is responsible. In the present case the injury has been caused by the thing contracted to be done. *Milligan v. Wedge* (a) was also referred to.

Foster, in reply, referred to *Addison* on Torts (b), and *Broom's Legal Maxims* (c).

Cur. ad. vult.

August 6. STEPHEN, C. J., now delivered the judgment of the Court as follows (having stated the facts as above):—

We are of opinion, having taken time to consider the authorities, that the Judge was right on both points. The case has been ably argued; and the general doctrine is conceded, that, for mere negligence or unskilfulness by a contractor, he alone ordinarily is answerable. But the principle on which, as we conceive, our decision must be against the defendants, is this—that here the injury, even if the particular act were against their supposed and intended direction, was the result of the doing of the very thing, by their appointee, which the defendants ordered to be done by him. If, as in *Butler v. Hunter* (d), the injury had been occasioned by something *collateral* to the order given, some negligence or unskilful act by the contractor, in the course of carrying out the work which was the subject of the order, the defendants would have been excused. But the cutting of this drain was, specifically, the act which they employed the contractor to perform.

(a) 12 A. & E. 742.
(c) p. 767.

(b) p. 553.
(d) 31 L. J. Exch. 217.

It was not enough to show that the defendants in general terms told him to prolong the cutting until a sufficient fall should have been secured—for the question would remain, when was that point attained—and of this, who was to be the judge? The defendants might have determined it for themselves, and for him; but they did not interfere. In other words, they left the solution to the contractor; and, delegating their judgment in the matter to him, we see no reason why they should not be made liable for his mistake. Nor is it any answer that the defendants were gratuitous but voluntary agents, acting merely for the public, or the inhabitants generally of their district. We assume that they were so; but, whatever sympathy for their position this may demand, their legal responsibility must be the same.

If the defendants would have been excused, in case their direction to the contractor had been specific and definite, but wilfully or carelessly disregarded—or in case the duty of cutting a drain, or causing it to be cut, had been imposed on them by statute, in any corporate capacity filled by them, or as public officers—it is sufficient to say that, in the present case, neither of these circumstances exists.

We do not propose to go through the many decisions, so numerous of late years, on these subjects, but will content ourselves by referring to *Hole v. The Sittingbourne Railway Company* (a), which, as distinguished from *Steel v. The S. E. Railway* (b), appears to us to be decisive of the present case. And, as to the liability of persons performing a public duty, we would merely refer to *Duncan v. Findlater* (c), and *Penhallow v. The Mersey Docks Board* (d), with the cases there cited respectively.

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(a) 30 L. J. Exch. 81.
(c) 8 Cl. & Fin. 902.

(b) 16 C. B. 550.
(d) 8 Jur. N. S. 491.

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The plaintiff, a licensed publican, was lessee for a term of years of premises on which he carried on that business, under four persons, of whom three were trustees, and the other a *cestui que trust*. Immediately after obtaining this lease, the plaintiff underlet to the defendant for the residue of the term, less three days, a strip of land leading from C. street to a theatre, the property of the defendant. In the deed then executed, the trustees and *cestui que trust* were concurring parties—they covenanting not to molest

the defendant or to distrain on the sublet portion of the demised premises in respect of any rent to accrue due to them. The defendant covenanted with the trustees, *cestui que trust*, and the plaintiff jointly, their heirs, &c., that he would within a specified time complete the theatre—that he would during his tenancy allow no other entrance to it from that street, nor any entrance to the boxes except from C. street—that there should be no entrance to the pit and gallery except from the demised land—and that he would always, whenever the theatre itself should be open, keep open all the doors leading from it to the said land; and further that he would impose similar covenants as to these entrances and doors on all tenants of the theatre. There then followed covenants with the same parties, and their and his heirs, &c., to pay the rent and taxes, and to repair, &c. The plaintiff sued the defendant for breach of covenant by not keeping open the doors which led from the strip of land to the theatre, although the theatre itself had at the time been open—but that he had closed them so that persons going to the pit and gallery, and who were accustomed to pass along the said piece of land to the great profit of the plaintiff in his business, could not use that entrance. *Held*, that no action was maintainable on the covenant declared on, or on any of the first set of covenants, by one or more of the covenantors less than the whole—but that all of them must join.

CUNNINGHAM *against* FITZGERALD.

THE declaration—after stating that the plaintiff was a licensed publican carrying on business in Castle-reagh-street, in Sydney, and that he was lessee for a term of fourteen years of the premises in which he carried on that business under four persons, of whom three are trustees under a will, and the other is the *cestui que* trust—alleged that he by deed poll demised to the defendant certain premises, to hold the same from July 1st, 1862, for all the residue and remainder then to come, and unexpired of, and in, a term of fourteen years demised to the plaintiff by an indenture of 1st July, 1862, save and except the three last days of the said term so demised to the plaintiff.

It then said that the defendant thereby covenanted with the plaintiff that he (the defendant) would thereafter, during all the time of the said lease when the Prince of Wales Theatre should be finished and opened to the public for the purpose of theatrical, operatic, and other performances, keep open the doors of the said theatre from the land to the theatre by the said deed demised, and which should thereafter be opened and made or used for the admission of the public to the pit and gallery of the said theatre. Averment of fulfilment of all conditions precedent. Breach, that after the making the said demise, the defendant during the said term has not, during the time of

the said lease when the said theatre was opened to the public for the purpose of theatrical, operatic, and other performances, kept open the doors of the said theatre from the land by the said deed demised to the said theatre—but on the contrary thereof had closed and shut up the doors of the said theatre from the land by the said deed demised, whereby the persons who were in the habit of attending the pit and gallery of the said theatre were prevented from ingress and egress to and from the said theatre, from Castlereagh-street, and thereby the plaintiff suffered great loss and damage in his business as a licensed publican.

Plea, setting out the deed declared on in full, from which it appeared that the parties were *J. F. Josephson*, *M. Joseph*, and *E. Druitt*, who were designated as trustees of the first part, *M. F. Josephson* of the second part, and the plaintiff of the third part, and the defendant of the fourth part. It recited a devise under the will of *J. Josephson*, deceased, to *J. F. Josephson*, and *J. Norton*, and *M. Joseph*, of certain land in Castlereagh-street upon certain trusts, giving *M. F. Josephson* a life interest with remainder to his children, and enabling the trustees to make leases of the hereditaments for not exceeding 21 years, with certain covenants. It then alleged the death of *J. Josephson*, and the granting of probate of his will to the two executors, *J. F. Josephson* and *M. Joseph*—and that *E. Druitt* had been duly appointed a trustee of the said will—and that the trust estate, &c., had been conveyed, &c., so that the same was now vested in *E. Druitt* jointly, with *J. F. Josephson* and *M. Joseph* as trustees. It then recited an indenture of lease of July 1st, 1862, between such trustees of the first part, *M. F. Josephson* of the second part, the plaintiff of the third part, and other persons named as “sureties” for the fourth part, whereby, under the power in *J. Josephson*’s will, the trustees and *M. F. Josephson* demised unto the plaintiff certain premises for fourteen years. It then (after stating that the defendant being about to rebuild the Prince of Wales Theatre, required for that purpose a parcel of land des-

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cribed in a schedule and delineated on a plan, being parcel of the land demised to the plaintiff by the last mentioned lease), said that the plaintiff demised that parcel of land to the defendant for all the residue of his term, wanting the three last days—reserving unto the plaintiff, his heirs, and assigns and others, the tenants and occupiers for the time being of the residue of land demised to the plaintiff, and to all other persons, a certain right of way, at the rent of five shillings a year. The deed declared on then contained a covenant by the trustees, and *M. F. Josephson*, &c., that they would not distrain on the said parcel of land for rent due or accruing due; and that they "will not sue the defendant, his heirs, executors, administrators, or assigns, upon or in respect of the covenants, provisions, and agreements, on the lessee's part contained in the said recited indenture of lease." There was then a covenant by the defendant, his heirs, executors, and administrators, with the trustees and *M. F. Josephson* and the plaintiff, their heirs, executors, administrators, and assigns—first, that the defendant, his heirs, or assigns will, on or before January 1st, 1864, build a theatre according to certain plans; and secondly, that he will not open, or make, or permit any other entrance to the theatre to be opened or made from Castlereagh-street during the term of this demise, but will at all times, during, &c., keep and make use of the land hereby demised as the sole entrance from Castlereagh-street, for the public, to the pit and gallery of the theatre; and thirdly, will hereafter, during all the time when the theatre shall be opened to the public for the purpose of theatrical, operatic, or other performances, keep open all the doors of the theatre from the land hereby demised to the theatre, and which shall hereafter be opened and made or used for the admission of the public to the pit and gallery of the theatre; and fourthly, that he will make such covenant compulsory on all tenants of the theatre; and fifthly, that he will not open any entrance except from Castle-reagh-street to the boxes and dress circle. The sixth covenant was by the defendant, his heirs, executors, and administrators, with the trustees and *M. F. Josephson*

and the plaintiff, and their and his heirs, executors, administrators, and assigns, that he will pay the rents reserved, and all rates and taxes which are or shall be assessed or imposed upon the demised premises, and will repair all buildings which might be erected on the demised land; and that he will, "at the end or sooner termination of the term hereby granted, quietly yield up unto the said trustees, their executors, administrators, or assigns, together with all buildings," &c. It then said that it should be lawful for the trustees and *M. F. Josephson*, their or his heirs or assigns, to enter upon the demised premises and inspect, &c. It then contained a covenant by defendant for repair, &c.; and provided that if the theatre were burnt, and no effectual steps taken by the defendant within six months to rebuild it, that then the covenants of the trustees and *M. F. Josephson* "shall cease and be void, and they or their heirs, executors, administrators, or assigns, or some or one of them, shall be at liberty to re-enter and repossess the land, &c., without prejudice to any right of action or remedy, which either of the said parties may have against" the defendant for any breach of covenant, &c. It then contained a description of the parcels, and identification of the various parties executing the same.

Demurrer and joinder.

Milford in support of the demurrer. The special damage is caused by not keeping particular doors to the theatre open, and the whole interest in that matter is in the plaintiff. The estate and interest of the plaintiff are distinct and independent. During the existence of the term, neither the trustees nor the *cestui que trust* can have the slightest interest in this covenant. The latter have the reversion expectant on the plaintiff's lease. The cause of action vested in the reversioner is independent of the remedy which the tenant may have, *Battishill v. Reed* (a); and the measure of damages may be quite different. If one of two or more covenantees have no interest, yet he must join if the covenant be

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joint; but if each have a distinct cause of action, then each may sue; otherwise the verdict, if both join, might be for one of the plaintiffs and against the other. The form of the covenant also, which is with the trustees and *M. F. Josephson* and the plaintiff, shows that the covenant of these parties is several. The rule is laid down in *Bullen* and *Leake* on Pleading (a), as follows:—"The construction of the contract in this respect depends primarily on the language used, but is a question of intention to be determined by considering, not only the language, but also the interests and relations of the parties. A contract will be construed to be joint or several according to the interests of the parties, if the words are capable of that construction, or even if not inconsistent with it. If the words are ambiguous or will admit of it, the contract will be joint if the interest be joint—and it will be several if the interest be several. On the other hand, if the words are unmistakably joint, then, although the interest be several, all the parties must be joined in the action; if the words are unmistakably several, the action must be several, although the interest be joint. Citing *Sorbie v. Park* (b), *Keighley v. Watson* (c), *Pugh v. Stringfield* (d), *Beer v. Beer* (e), *Foley v. Addenbrooke* (f), *Haddon v. Ayers* (g)."

Martin, Q. C. (*Sheppard* with him), for the defendant. The rule is, wherever the interest of the covenantee is joint, although the covenant be in terms joint and several, the action follows the nature of the interest, and must be brought in the name of all the covenantees; but where the interest of the covenantees is several, they may maintain separate actions, though the language of the covenant be joint; *Withers v. Bircham* (h). But where one of two covenantees has no beneficial interest whatever, there the action must be joint; therefore, if a man covenant with *A.*, and also with *B.*, to pay an annuity to *A.*, his executors and administrators, during

(a) [2nd Ed.], p. 407.
(c) 3 Exch. 721.
(e) 12 C. B. 60.
(g) 28 L. J. Q. B. 105.

(b) 12 M. & W. 154.
(d) 27 L. J. C. P. 34; 3 C. B. N. S 2.
(f) 4 Q. B. 197.
(h) 3 B. & C. 254.

the life of *B.*, this is a joint covenant—and upon *A.*'s death his executor cannot maintain an action, but the right of action survives to *B.*; for though the covenant be separate, the legal interest is joint; *Anderson v. Martindale* (*a*). In this case there was no interest whatever in the trustees—and so under the rule stated and admitted all must join. The defendant's covenant ceases the moment of his ceasing to be tenant under the plaintiff—so that if the plaintiff's own lease to his landlord should terminate, then the defendants sub-lease and consequently the defendant's covenant ceases also. It is not a covenant, therefore, which runs with the land. It is laid down by Lord *Brougham*, in *Keppell v. Bailey* (*b*), that covenants which can run with the land must be of such a nature as to "inhere in the land," to use the language of some cases; or they must "concern the demised premises and the mode of occupying them," as is laid down in others; or they must both concern the thing demised and tend to support it, and support the reversionary estate. The law will not allow incidents of a novel kind to be devised and attached to property at the owner's caprice; *Ackroyd v. Smith* (*c*). There is nothing in the lease to the defendant to show that this plaintiff's house was a public-house, and so that he could have any peculiar interest. The covenant now in question is to open and keep opened a door leading from the defendant's own land, on which the theatre is built to the passage, which passage is the subject of the sub-lease to him from the plaintiff. In this covenant, the owners and landlords of the passage in reversion have no conceivable interest; and, therefore, all the covenantees should join according to the rule stated. If, however, it is considered that the trustees have an interest in the building of the theatre, it is certainly a joint interest, and in that view of the case the plaintiff cannot sue alone.

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Milford in reply. The reversioners might sue, and the question whether they are damaged or not would be for

(a) 1 East 497; cited in 1 Wms. Sds. 154, note (a).
 (b) 2 M. & Keen. 517. (c) 10 C. B. 164.

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the jury. The opening of the door is directly connected with the building of the theatre; and the trustees, therefore, are interested as reversioners in each covenant, but differently, so that the action must be brought separately by each. The passage is carried out on the land owned by the trustees—all of which was leased to the plaintiff, and in which, therefore, they had the reversion; and this is a covenant with both the plaintiff and the trustees that there should be a theatre erected by the defendant on land adjoining their land.

Cur. ad. vult.

August 7.

The judgment of the Court was now delivered by STEPHEN, C. J. This is an action by one only of several covenantees (he claiming to be separately interested) against the covenantor, for an alleged breach of covenant; and the question for our decision is, whether the plaintiff can sue alone.

The following facts appear on the face of the pleadings. The plaintiff, a licensed publican in Sydney, is lessee for a term of fourteen years of the premises in which he carries on that business under four individuals—of whom three are trustees under a will, and the other is the *cestui que trust*. Immediately after obtaining this lease, the plaintiff underlet to the defendant for the residue of the term, less three days, at a nominal annual rent, a strip of land leading from the street to a theatre, then in the course of erection, the property of the defendant. In the deed then executed, and on which the question here arises, the trustees and *cestui que trust* are concurring parties—they covenanting not to molest the defendant, or distrain on the sublet portion of the demised premises, in respect of any rent to accrue due to them.

There then follow covenants by the defendant, with these five persons jointly (the trustees, *cestui que trust*, and the plaintiff), their heirs, executors, and assigns, that he will within a specified period complete the theatre—that he will during his tenancy allow no other entrance to it from that street, nor any entrance to the boxes

except from Castlereagh-street—that there shall be no entrance to the pit and gallery except from the demised land—and that he will always, whenever the theatre itself shall be open, keep open all the doors leading from it to the said land; and further, that the defendant will impose similar covenants, as to these entrances and doors, on all tenants of the theatre. The defendant proceeds to covenant with the same parties, and "their and his" heirs, executors, and assigns, that he will pay the rent, and all taxes on the demised premises—that he will keep in repair all buildings, at any time erected by him or them—and that, at the expiration of the term, he will deliver them up (to "the trustees," the deed says, but, as the instrument itself shows, the then revisioner would be the plaintiff) in such repair—and lastly, that the defendant will permit the trustees and *cestui que trust* to enter on the land at any time for purposes of inspection—and will repair, upon notice by them.

The plaintiff complains that the defendant has violated his covenant by not keeping open the doors, as stipulated for, which led from the strip of land to the theatre, although the theatre itself has at the time been open; but that he has closed them, so that persons going to the pit and gallery, and who were accustomed to pass along the said piece of land to the great profit of the plaintiff in his business, can no longer use that entrance.

Having fully considered this case—which involves a legal question of much difficulty—we are of opinion that no action is maintainable on the covenant declared on, or on any of the first set of covenants, by one or more of the covenantees less than the whole, but that all of them must join. It may be conceded that the trustees (and, beneficially, their *cestui que trust*) have an interest indirectly in certain of the things there covenanted to be done, or not to be done; but we do not find one covenant throughout the series, in which this plaintiff is not also interested with them in the same things. In the erection of the theatre, all the parties were more or less interested; the plaintiff, in respect of the resort to his house by persons passing it in their way to the theatre;

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and the trustees, in respect of the increased value of that house, at the expiration of the fourteen years—should the theatre then continue in existence. So, in like manner, and for the like reasons, all were interested in the making and preserving of the entrances and doors, to and from the theatre. But, with the term of lease, all these covenants expire. The interest of the covenantees, therefore, appears to have been (rightly or wrongly) considered as joint during that period. There is no undertaking to keep the theatre in repair, still less to maintain it for public performances, after the expiration of the term ; and it would be almost absurd to suppose that the defendant ever intended so to bind himself, for all time coming, after his own right to use the passage had entirely ceased.

In the second series of covenants, indeed (where the terms of limitation seem to have been purposely changed, as if contemplating separate interests and separate rights of action), there is at least one covenant in which the trustees clearly have no interest—that, namely, for the payment of the rent. And so it may be said, conversely, that the plaintiff has none in the stipulation respecting entry on the land, and notice to repair ; powers, which are conferred on the trustees and *cestui que trust* only. But with these later covenants, be they joint or several, we are not now dealing.

According to all the cases, it is not enough to sustain a separate action that there may be, in some one portion of a covenant, in terms clearly joint, a separate interest existing ; nor that there may be difficulties, in a joint action by all the covenantees, in adjusting their various interests. If the cause of action (or, as Mr. Justice *Milford* thinks, if the interest) be joint—or if, in any one matter the subject of a joint covenant, all the covenantees are interested, though in very different degrees—all must join in an action for breach of any of the covenants, although in respect of the particular breach one covenantee may have no interest whatever. Here the covenant is, undoubtedly, in terms joint ; and, as it seems clear to us that, had the theatre not been built,

an action for the breach of that covenant must have been brought by all the covenantees, so there must be the same result and course when the breach is the closing of doors, leading from the demised premises to the theatre—even though the plaintiff may be the only person thereby injured. The defendant, therefore, will have judgment on this record.

We may mention the cases of *Foley v. Addenbrooke* (a), *Hopkinson v. Lee* (b), *Sorsbie v. Park* (c), and *Bradburne v. Botfield* (d), all of which were cited on the argument—and the case of *Keightley v. Watson* (e)—as authorities for our decision.

I desire to add, for myself alone, that there appears to me to be no insuperable difficulty, although suggested at the bar, in joint covenantees—of whom some may, in the particular matter, have one degree of interest, and others a different interest—uniting their claim for damages in one suit, in respect of all such interests; for each covenantee may, as to a portion, be a trustee for his fellows, and with this consideration the jury would have nothing to do.

Judgment for the defendant.

LEVY against MOLLISON and another.

June 21.

STEPHEN moved, on behalf of the defendants, in an action brought by order of this Court, under the Interpleader Act, either to vacate the said order, or prevent the plaintiff from proceeding further in the case, on the ground of his unreasonable delays in the conduct of the same.

The circumstances out of which this notice and the order in question arose, are the following. *Mollison*

which B. claimed a lien, but upon which A. had levied, and directing that A. should proceed to trial of his action at the earliest available day. B. retained possession of the goods, but gave a bond conditioned to pay their value, or the amount of A.'s demand on them, in case A. obtained a verdict. It being found that due diligence had not been used by A. to bring the cause to trial, the Court, upon the application of B., ordered the bond to be delivered up to be cancelled, and A. barred from further prosecuting the action.

An inter-pleader order had been obtained directing the trial of various issues between A. and B. as to the ownership of certain goods in the possession of B., and over

(a) 4 Q. B. 207. (b) 6 Q. B. 970. (c) 12 M. & W. 154.
(d) 14 M. & W. 578. (e) 8 Exch. 722.

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and *Black* held certain goods, consigned to them from China, as the property of one *Cecil* and his partners, whom they sued for certain advances of money and commission. Immediately after their obtaining a verdict in that action, in July last year, *Cecil* alone gave a confession of judgment to his attorney, *Levy*, on which the latter levied on those goods, as the sole property of *Cecil*. *Mollison* and *Black* then gave notice to the sheriff, claiming a lien on the goods, as factors, in respect of the said advances; and he obtained, thereupon, the usual interpleader order, directing the trial of various issues as to the ownership. *Levy* was made the plaintiff for that purpose, *Mollison* and *Black* retaining possession of the goods, but giving a bond for his protection conditioned to pay their value, or the amounts of *Levy*'s demand on them, in case of the latter's obtaining a verdict.

It was part of the order, however, that *Levy* should proceed to trial of his action at the earliest available day; and it appeared that he set it down, accordingly, for the 24th August, but the sittings ended on the 27th, and the cause went over as a remanet. On the 20th October *Levy* obtained a rule for a commission, to examine witnesses in China, with a stay of all proceedings in the action until its return. Under this rule, however, the plaintiff did nothing, or, at any rate, he took no known steps; and, on the 4th day of March last the Court granted a rule vacating the former one, unless the commission should be sued out and forwarded on or before the 26th. This not having been done, and no steps whatever being subsequently taken to bring the cause to trial, the defendants, on the 21st of June, made the present motion.

It is laid down in *Chitty's Archbold* (a), that if a feigned issue be directed to be tried between the parties, and it be not delivered by the plaintiff in the time limited, a rule or order may be obtained for delivering over to the claimant the subject matter in dispute, with costs; and if there is reason for supposing that the

(a) p. 1835.

plaintiff wishes to delay the trial, the Court will allow the defendant to take down the record by proviso (a), *Sandys v. Mayor of Beverly* (b); and this must be the subject of a special application; *Wick v. Cotton* (c).

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Isaacs shewed cause.

Cur. ad. vult.

The judgment of the Court was now delivered by STEPHEN, C. J., who after stating the circumstances as above, continued:—

August 7.

It is clear, from the case of *Dickinson v. Eyre* (d), *King v. Simmons* (e), and several others, that proceedings in and matters connected with actions or issues directed under the Interpleader Act, are not subject to the rules which apply to ordinary actions. Under no circumstances, therefore, could these defendants avail themselves of the provisions of the Common Law Procedure Act. The only course is to apply to the Court for a special order, such as the case shall require; which may be one, where there has been undue delay, having a similar effect to a judgment as in case of nonsuit, *Scales v. Sargeson* (f), and *Wick v. Cotton* (c). The defendants have applied to us accordingly to (in effect) put an end to this action. They are equally interested with *Levy*, or more so, assuming both claims to be on the same footing meritoriously, in having a speedy decision; and it is proved to our satisfaction that due diligence has not been used by him to bring the cause to trial, or to procure the evidence alleged by him to be wanted. In the mean time, the goods remain in the defendants' hands, who are necessarily in a very embarrassing position with respect to them.

The plaintiff says that he was unable to obtain the names of persons in Shanghai, or at Hong Kong, who would have acted as commissioners for him. But he unquestionably knew last August, as well as he did in

(a) *Id.* 857.

(b) 12 *W. & W.* 568.

(c) 1 *D. & L.* 227.

(d) 7 *D. P. C.* 721.

(e) 1 *H. L. C.* 755.

(f) 3 *D. P. C.* 707.

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October, that such persons would be required; and it seems incredible that Mr. *Levy* could not, by the exercise of reasonable skill and care, have discovered at least one such, in the long interval before the 26th of March. His client, *Cecil*, was at hand to give him information, and that gentleman's partners actually were living in China; whereas, the defendant's attorney swears that he made inquiries in Sydney only, but had no difficulty himself in learning the names of commissioners, and he believes that the plaintiff would have experienced none.

On the 26th March, however, the limited period expired, and it became instantly the plaintiff's duty, in compliance with the clear intent and meaning of the original order, if not its literal terms, thereupon to set this cause down for trial, and cause it to be tried, if possible, at the ensuing sittings in May. We have ascertained that he could have accomplished this, for five causes, entered after the 26th March, were in fact tried at those sittings.

Under all the circumstances stated, we think it our duty to the defendants to order that their bond—given under the interpleader order—be delivered up to them to be cancelled, and that the plaintiff be barred from further prosecuting this action. We direct, also, that he shall pay the defendants the costs of it, including the costs of this application and that of the 4th March last, together with all expenses and costs incurred by the defendants under and in pursuance of the interpleader order—but not the costs of that order.

The rule to be drawn up in pursuance of these directions will, as in one of the cases cited, be entered on the record; and it will then, by force of the statute, have all the effect, though not the form—of a judgment.

Order accordingly.

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Ex parte BACKHOUSE.

June 14.

A RULE nisi for a prohibition had been obtained to restrain certain magistrates sitting in Petty Sessions, and the Municipal Council of Wollongong, from further proceeding upon, and in respect of, a certain judgment for a debt due for rates to the Municipal Council of Wollongong by the applicant, *Backhouse*. The applicant had been sued in the Small Debts Court of Wollongong, by the municipality of Wollongong, for rates due to the municipality, and had been ordered to pay them.

Debt for rates due to a Municipality under the provisions of the 22 Vic., No. 18, will lie in a Small Debts Court, created by the 10 Vic., No. 10.

Butler now moved to make the rule absolute. No action at law will lie for rates claimed by a Municipal Council. There is no privity between the parties. The municipality is the creature of the statute; and except so far as authorised by the statute, it has no power to sue at all. He referred to the judgments of *Parke*, B., in *Finlay v. The Bristol and Exeter R. Co.* (a). *Pardoe v. Price* (b), *Clarke v. Woods* (c), and the *East Anglican R. Co. v. Eastern Counties R. Co.* (d).

But at all events it cannot sue in the Small Debts Court created by 10 Vic., No. 10. By sect. 4, such Courts have no jurisdiction in any case where the matter in issue relates "to any annual rent, or other matter in which rights in future may be bound;" but in this case, by this judgment, such rights are clearly bound; for by sect. 81 of the Municipalities Act (e), any such unpaid rate or assessment shall be a charge upon the premises for which the same are payable, and may be recovered at any future time, upon and after the expiration of thirty days from notice being given to the occupier thereof, by distress upon any goods that may be then found upon the premises. So that, if rates are unpaid

(a) 7 Exch. 417; 21 L. J. Ex. 117.

(c) 17 L. J. M. C. 189.

(e) 22 Vic., No. 18.

(b) 11 M. & W. 437.

(d) 21 L. J. O. P. 23.

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in respect of land which is unoccupied, and where no effectual distress can be levied, those rates are a charge upon the land for which any future owner or occupier of the premises is liable. And that the act was never intended to apply to cases like the present, is shown by sect. 25, which provided that the Court may examine the plaintiff or defendant, *viva voce*, on their several corporal oaths. How can a corporation be so examined?

Sir *W. Manning*, Q. C., showed cause on behalf of the municipality. [Stephen, C. J. We see no difficulty as to the provision about future rights.] The fourth section gives these Courts jurisdiction in all actions whatsoever for the recovery of any debt, demand or damage not exceeding £10; and must include actions by corporations. [Wise, J. By the sixth section of the Acts Shortening Act (a), the word "person" or "party" shall be deemed to include bodies politic or corporate—and that section is retrospective.] The twenty-fifth section, which enables the Court to examine the parties, may only apply when such parties are persons, and not to cases of representative bodies that cannot be examined. But the latter section will not be so construed as to take away the general right given by the former. The Municipalities Act, sect. 81, points out a particular mode of recovering rates assessed under the provisions of the Act; but this summary remedy does not deprive the municipality of the power of enforcing payment by an action of debt. The former not being co-extensive with the liability, is a permissive and also a cumulative mode of proceeding. In *Goodey v. Penny* (b), the act under which the rates were imposed, authorised the clerk to sue for "any penalty or sum of money due and payable by virtue of this act;" and it was held that he might recover in an action of debt for arrears of rates—although, by another clause, a power was given of detaining and selling the vessel and goods in case of neglect or refusal to pay such rates. In the language of *Parke*, B., in that case, the plaintiffs have a parliamentary right

(a) 16 Vic., No. 1.

(b) 9 M. & W. 687.

of action, by the statutory obligation to pay the rates to them. Where there co-exists a legal right on the one side to receive money, and a legal liability on the other to pay it, an action of debt will lie; *Addison v. The Mayor, &c., of Preston* (a). He referred to *Stevens v. Evans* (b).

Innes appeared for the magistrates.

STEPHEN, C. J. This is an important question—and we therefore took time to consider it. The question is, whether corporations created under the Municipalities Act of 1858 can sue in a Small Debts Court, created by the 10 Vic., No. 10, for rates? And we are of opinion that they can so sue—not only in the District Courts, but also in the Small Debts Courts. The corporation has power under the Act to levy rates, for the purposes stated in the Act, which are to be paid. If not paid within thirty days of the notice, the eighty-first section authorizes the issue of a distress warrant. The legislature having given corporations of this kind a right to levy rates, and said that they shall be paid to them, I am of opinion that a debt, for which the ratepayer is liable, arises immediately the rate is imposed. *Goodey v. Penny* is an express authority to show that an action of debt is the appropriate remedy.

It is said that no action will lie in the Small Debts Court, because the twenty-fifth section enables the Court to examine the parties on oath, as it is clear that a corporation cannot be put upon its oath. But a corporation can appear by attorney, and its officers may be examined (c).

I am also of opinion that the sixth section of the Acts Shortening Act is retrospective, and applies to this case; and for this reason also corporations are included within the provisions of the Small Debts Courts Act. The rule, therefore, must be discharged. The corporation will get their costs. Justices having no interest in

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(a) 12 C. B. 183; 21 L. J. C. P. 146. (b) 2 Burr. 1157.

(c) See the judgment of Willes, J., in *Christophersen v. Lottinga*, 33 L. J. C. P. 121.

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resisting applications of this kind, will, if they appear and are wrong, be made generally to pay costs. But here the justices ought to get their costs, because one of the grounds on which the rule was asked was on the ground of unfairness, and they have been dragged here to meet that charge.

WISE, J. If the charge made against the justices had been substantiated, they ought to have been called on to show cause why a criminal information should not issue; but it has altogether failed, and they are entitled to their costs. I am of opinion that the case is within the sixth section of the Acts Shortening Act. But if it were not, looking at the various clauses of the 10 Vic., No. 10, I think corporations are included in its provisions.

On the more important question I have no doubt. The mistake has arisen from a misconception of the maxim, that where a statute prescribes a remedy, no remedy can be taken but the particular remedy so prescribed. But that maxim is limited to cases where the remedy is given at the same time as the right. Here, however, the right is given by one clause, and a subsequent clause gives a cumulative remedy by distress, which is a very different case. *Addison v. The Mayor of Preston* shows that an action of debt will lie where there is on one side a legal right to receive money, and on the other a legal liability to pay it. I am therefore of opinion that debt will lie for arrears of rates due to a Municipal Council.

Rule discharged.

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The MAYOR and others *against* Toogood.

March 11.

SPECIAL case stated by consent.

1. The plaintiffs in this action are the Mayor, Aldermen, and Citizens of Sydney, constituted by and deriving their powers and authorities under the Sydney Corporation Act, 1857 (a).

2. The defendant is the owner and occupier of certain premises situate in King-street and Pitt-street, in the city of Sydney.

3. In or about the year 1855, "the Commissioners for the city of Sydney," appointed under and by virtue of the Sydney Corporation Abolition Act, 1853 (b), began to make and construct, under and in accordance with the provisions of the Sydney Sewerage Act, 1853 (c), a public sewer within the said city.

4. In or about the year 1855, a part of the said public sewer was completed, in accordance with the provisions of the said last mentioned Act, so as to be ready for use in Pitt-street and King-street, within the said city, so that the same might be communicated with by drains or sewers from the defendant's said premises—the said premises being in the neighbourhood of the part of the said public sewer so completed as aforesaid.

5. Messrs. *McBeath* and *Williams* having been duly appointed by the Municipal Council of the said city, valuers for the said city, made and subscribed in manner and time as by law required, before a justice of the peace for the said city, the declaration required by the 129th section of the Act, 14 Vict., No. 41.

shall be due and payable in advance, on and from the day when such sewer shall be so complete and ready for use and communication." In an action for sewerage rates, where a part of a sewer had been completed in accordance with the provisions of the Sewerage Act, and was ready for use, so that it might be communicated with by drains or sewers from premises in the neighbourhood of the part of the sewer so completed, and an assessment was duly made under the provisions of sect. 128 of the Sydney Corporation Act, by which the value of such premises for the purpose of the City rates was fixed, Held that a debt was created from the occupier of such premises to the Corporation, to the extent of the rate specified, measured as to the amount payable in each case by the City assessment.

(a) 20 Vict., No. 96. (b) 17 Vict., No. 33. (c) 17 Vict., No. 34.

The seventeenth section of the Sewerage Act enacts that, "so soon as a public sewer or any part thereof shall have been completed, so as to be ready for use, in any street or other place within the city, so that the same may be communicated with by drains and sewers from the respective houses, &c., in the neighbourhood thereof, the occupier of such houses, &c., shall pay to the Commissioners the following rates per annum (specifying them), and every such rate shall be payable according to the amount at which such houses, &c., shall be assessed to the city rate, if the same have been so assessed;" and "such rate

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6. Afterwards, the said Messrs. *McBeath* and *Williams*, by order and direction of the said Municipal Council made and entered in the Ward Assessment books of the said city an assessment of every building, tenement, and other property, amongst them of the defendant's said premises, within the said city for the year 1862, according to the full, fair, and average annual value thereof, clear of all outgoings.

7. The said Ward Assessment books, when completed respectively, were by the said valuers delivered to the town clerk, who, as soon as conveniently could be thereafter, caused a notice of such assessment to be left at the defendant's said premises, in accordance with the Act of Council in that behalf made and provided.

8. On or about the twenty-first day of January, 1861, the said Ward Assessment books were duly confirmed by the said Municipal Council, and signed by the town clerk—the defendant not having appealed against the said assessment of the said premises.

9. The assessment of the defendants said premises so made as aforesaid by the said valuers, and by them entered in the Assessment book for Bourke Ward, being the ward of the said city in which the defendant's said premises are situate, is, nett annual value, £560.

10. On August 18th, 1862, the said Municipal Council passed and entered in their Minute book a resolution in the terms following, that is to say—"That this Council do hereby order that a Sewerage Rate for the year ending 31st December, 1862, as hereunder set forth, be made and levied upon all properties in the city of Sydney so situated—that the same can be communicated with a public sewer or part thereof, that is to say upon premises assessed at

			£20 or under, at the rate of £7½ per cent. per annum.
Above £20, and not exceeding £40,	6	"	"
" £40, "	£60,	5½	"
" £60, "	"	5	"
" £100, "	£100,	4	"
" £200, "	£200,	3	"

11. The plaintiffs seek to recover from the defendant in the present action the sewerage rate for the year 1862,

calculated according to the assessment made by the said valuers as hereinbefore mentioned, and entered in the said Assessment book for the said Bourke Ward, and at the rate mentioned in the said resolution of August 18th, 1862.

If the Court should be of opinion that the plaintiffs ought to recover, a verdict is to be entered for them in the sum of £16 16s., with costs. If otherwise, a verdict is to be entered for the defendant with costs."

The *Attorney General* (the *Solicitor General* and *Darvall*, Q. C., with him) for the plaintiff. By the 20 Vic., No. 36, all powers granted to the Commissioners are transferred to the corporation. The special case shows that all the provisions of the 128th section (a), of the Sydney Corporation Act, 14 Vic., No. 41, have been followed, and that the assessment has been duly made. And the defendant, therefore, is liable to pay this sewerage rate, under the seventeenth section of the 17 Vict., No. 34.

Isaacs for the defendant. The sewerage having been completed in 1855, the defendant may have been liable

(a) This section enacts that "it shall be lawful for the said Council" and they are hereby authorised and required from time to time, to order and direct such valuer or valuers as they may appoint to make and enter in books to be provided for the purpose (a separate book being kept for each ward in the form and to the effect of the schedule to this Act annexed, marked K., and such books being called the Ward Assessment books), an assessment of every building, tenement, or other property within the limits of the said city, according to its full, fair, and average annual value, clear of all outgoings; and such Ward Assessment books, when completed by such valuers respectively, shall be by them delivered to the town clerk, who shall, as soon as conveniently may be thereafter, cause a notice to be served on or left at the premises of every proprietor or occupier (as the case may be) of the buildings, &c., assessed; and such notice shall be in the form or to the effect of the schedule to this Act annexed, marked L., and shall contain the name of the person whose property is assessed, the net annual value of such property, and the amount at which the same is assessed." The proviso then follows, giving a power of appeal to Quarter Sessions against assessment after seven days' notice of appeal to the town clerk.

Section 129 provides a form of declaration to be made by valuers before entering on their duties; and section 130 directs that if no notice of appeal be lodged with the town clerk within the time limited, or if so lodged, then after the determination of the same by the Quarter Sessions, and the necessary alterations made in the Ward Assessment books, "such books shall be confirmed by the said Council and signed by the town clerk, and shall thereupon be" the assessment books of the city until a new assessment be made.

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for a rate from the particular time when it was completed. But, according to the special case, the assessment relied on was in and for 1862. Suppose the sewerage was completed on June 30, 1855, so as to render the rate payable, there is nothing to show that the defendant may not have been assessed from June 30, 1855, to June 30, 1856, and have paid his rate in and for that year, and in and for every subsequent year, inclusive even of part of the year 1862, so that he may have already paid on this hypothesis up to June 30, 1862. The plaintiff should have shown that the defendant is not now assessed for a period during which he has already paid. The assessment for the rate for 1862 may be altered by the corporation of the succeeding year. But this assessment is bad, as it is for the whole year of 1862, whereas some of the councillors or aldermen go out of office on the 1st of December in each year. The assessment should have been for the municipal year, beginning and ending with the municipal year, that is December 1st. This principal was laid down in *Berry v. Graham* (a), and *Nichols v. Piesley* (b), which were decisions under the Municipalities Act. [Stephen, C. J. But there the power was given for the municipal year, or it was doubtful whether it was given for the Municipal or Almanack year. In such a case this Court concluded that the corporation had no power to tax, except for the year during which the Council held office; the power being one to be exercised annually. But here the power is to tax "from time to time," and not merely for the current year, but for all time coming at a rate which is itself payable annually, but is to be fixed whenever the Council may determine. Wise, J. Where is the section expressly conferring the power of imposing a rate?]

The *Attorney General* in reply. If the assessment were for a less amount than that specified in the statute, the question of the corporation's power might have arisen as in *Cortis v. The Kent Water Works* (c). But the corporation has imposed the exact rate specified in the

(a) February 7, 1862. (b) April 26, 1861. (c) 7. B. & C. 240.

enactment neither more nor less and the duty of paying it is imposed on the several occupiers by the section itself. The question is only, whether the plaintiffs have the power of directing and making a levy for, and a right to recover in this action, the amount of that rate for the one year mentioned. It must be assumed that all the other rates prior to that date have been either paid or none have been paid. From the day when any part of the sewerage is completed, then the liability commences. If the present action were for the rate of 1855, the exact day when it became due might be material. There being no clause authorising a distress, the plaintiffs' remedy is by action. Even if this were a retrospective rate, there is no rule of law which prohibits such a rate; but it depends upon the intention of the legislature whether it be expressed or implied in the statute under which the rate is made; *Harrison v. Stickney* (a).

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The judgment of the Court was now delivered by

August 6.

WISE, J. This is a special case stated by consent—and the question is, whether under the circumstances stated the Mayor and Corporation of Sydney are entitled to recover the amount assessed upon the defendant, *Alfred Toogood*, for sewerage rates?

It appears, by the case, that in 1855 a part of the public sewer was completed, in accordance with the provisions of the Sewerage Act, 17 Vic., No. 34, by the Commissioners for the city of Sydney, ready for use in Pitt-street and King-street, and so that the same might be communicated with by drains or sewers from the defendant's premises—the premises being in the neighbourhood of the part of the public sewer so completed. And that subsequently an assessment was duly made under the provisions of the Sydney Corporation Act, 14 Vic., No. 41, sect. 128, by which the value of the defendant's premises for the purposes of city rates was fixed.

Before considering the effect of the statements in the case as to the resolution of the corporation that a sewerage rate should be levied, it will be well to decide

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what is the effect of the 17 Vic., No. 34, sect. 17, by which the liability to pay the sewerage rate is imposed. It provides that "so soon as a public sewer, or any part thereof, shall have been completed, so as to be ready for use in any street or other place within the city, so that the same may be communicated with by drains and sewers from the respective houses, buildings, or other premises in the neighbourhood thereof, the occupiers of such houses, buildings, or other premises respectively, shall pay to the Commissioners the following rates per annum (specifying them) (a); and every such rate shall be payable according to the amount at which such house, building, or other premises shall be assessed to the city rate, if the same shall have been so assessed, but if not, then according to the actual value thereof; and such rate shall be due and payable in advance, on and from the day when such sewer shall be so complete and ready for use and communication."

This section creates a debt to the extent of the rate specified, measured as to the amount payable in each case by the city assessment. It is in fact equivalent to the expression used in the first Sewerage Act, 14 Vic., No. 33, sect. 7, "the payment of such gross or annual sum in the nature of a rate or rent." It is a statutory duty imposed on the owner, and debt will lie to recover the amount—as recently decided by this Court in the case of *Ex parte Backhouse* (b), with reference to the rates imposed under the Municipalities Act.

Irrespective, therefore, of any order of the Corporation, we think that there was a liability to pay under the seventeenth section of the 17th Victoria, in respect of the actual value until assessment, and in respect of the assessed value afterwards.

It is not, indeed, anywhere stated that the amount of rate due in 1861 was paid. Whether it was so or not, we think it sufficiently appears in the case that £16 16s. is due now for the year 1862—and consequently that is

(a) The rates specified in this section are the same as those contained in the resolution of August 18th, 1862, *ante* p. 90.

(b) *Supra*, p. 85.

the amount for which the verdict will be entered, if we think the plaintiffs entitled to recover. Such is our opinion, and the verdict will be entered accordingly.

It must be noticed that the rates mentioned in the resolution are identical with those in the statutes, and we think it very questionable whether there exists any power to alter those rates. We have searched in vain for a section giving such power; but at the same time it is not necessary in this case to give any absolute opinion upon this point.

Judgment for the plaintiff.

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NATHAN *against* FIELD (a).

June 8.

APPEAL from the Sydney District Court. The case was as follows:—

"This was an action in which the plaintiffs, as trustees of the assigned estate of one *John Foulis*, sought to recover from the defendant certain charges for medical attendance by the assignor.

The case was tried before me at Sydney, on April 12, 1864, without a jury.

To shew the right of the plaintiffs to sue, it was proposed to put in evidence a deed of assignment as executed under the provisions of the 5 Vic., No. 9.

Proof was given of due execution by the plaintiffs and the assignor, and by four-fifths in number and value of the creditors, and of the other matters required by the Act.

It was, however, objected on behalf of the defendant, that the name of the defendant as a creditor for the amount of £17 13s. 9d., owing to him at the time of execution of the deed, did not appear in the schedule of creditors, though his name did appear as a debtor to the assignor for £30 9s. in the schedule of debtors.

There was no evidence that the omission was wilful; but being of opinion that the deed was not in conformity

A deed of assignment of all the debtor's property for the benefit of all his creditors, executed under the provisions of the thirty-third and following sections of the 5 Vic., No. 9, is not invalid, because of the accidental omission from the schedule attached to the deed of the name of a creditor for the sum of £17 13s. 9d.; it appearing that he was such creditor as well as a debtor in the sum of £30 9s.

(a) Before *Stephen, C. J., and Milford, J.*

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with the act on account of such omission, I sustained the objection, rejected the evidence, and non-suited the plaintiffs.

The following objections have been filed against my decision, the questions for the opinion of the Court are, whether I properly rejected the deed on the objections stated, and non-suited the plaintiffs?

The objections referred to are, 'that his Honor improperly rejected as evidence a certain deed of assignment, though proved to have been executed by the necessary parties and under the condition required by law. That his Honor improperly non-suited the plaintiffs, on the ground that the defendant to whom the assignor, *John Foulis*, owed a debt of £17 13s. 9d. at the time of the execution of the said deed of assignment, was not mentioned in the schedule of creditors, though he was as a debtor for £30 9s. in the schedule of debtors appended to the said deed.'

JAMES S. DOWLING, *Judge.*"

Sydney District Court.

Windeyer for the appellant. The deed is valid, and the omission of the name of the creditor is immaterial. Under sect. 36, the only omission which will invalidate deeds under this Act must be both wilful and material; and this was Mr. Justice *Milford's* opinion as expressed in *In re Ellis' Assignment* (a). Neither does non-execution by the creditor prevent his being bound by the deed. *Speger v. Chaffers* (b), and *Ilderton v. Jewell* (c), were referred to.

Salamons for the respondent. The deed may be good as an assignment at common law; but as it is not executed with the conditions required by the Act, it does not enable the trustees to sue for *choses in action* vested in the assignor. And as there was no privity of contract between these parties, the plaintiff was properly non-suited. The statute requires that the names of the

(a) October 13, 1860.

(b) 33 L. J. C. P. 7.

(c) 33 L. J. C. P. 256.

creditors and the amount of their debts shall be given in the schedule ; here, they are not given either in the deed or the schedule.

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STEPHEN, C. J. I think the appeal must be sustained, and that the non-suit ought to be set aside. The question is, whether the deed of composition executed under the provisions of the thirty-third and following sections of the 5 Vic., No. 9, is invalid, because of the omission from the schedule attached to the deed of the defendant's name as a creditor for the sum of £17 13s. 9d.; it appearing that he was such creditor as well as a debtor in the sum of £30 9s. And I am of opinion that the deed is not thereby avoided; it being clear by the special case, and by the deed itself, to which the Court has been permitted by consent to refer, that the deed of assignment is of all the debtor's property, and is for the benefit of all his creditors whether named or unnamed—and it being admitted that the omission is accidental only; for every one of the creditors might come in and execute the deed, and although he is not named, he is one of the *cestui que trusts*. Under the 5 Vic., No. 9, if a creditor be not named, he is not bound—but he gets all the benefit of the assignment. It is provided by sect. 33 that where the trust deed is for the benefit of all the creditors, and shall be executed and published according to the provisions of the statute, "the person of such debtor shall be absolutely free from arrest in execution at the suit of any creditor named in such schedule, in respect of any debt or sum therein included." At that time creditors possessed a power of arrest—so that the first benefit conferred by the assignment was that the debtor could not be arrested by a creditor who was named in the schedule; although he could be arrested by a creditor not named. The thirty-fifth section provides that the deed shall not be good if it contain certain special clauses for the benefit of the creditor, unless such deed shall have been executed by not less than four-fifths in number and in value of his creditors; but that where any deed shall be so executed, the same and the several

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provisions shall be binding on all the creditors named in such schedule whether assenting or not. The next section enables every such deed, at the instance of any creditor, to be set aside for fraud, or for any wilful and material error and omission in either of the schedules, if the Court considers it to be material and wilful, or the Court may deprive the debtor of all benefit under the deed, although the deed itself is allowed to stand. Would such a provision have been inserted if any error rendered the deed void? The words are, "it shall be binding on all *named*" (a)—on nobody else. It has been argued that if the creditors be not named, the deed is void. I am of opinion that if that had been intended, it would have been so provided by the Legislature. The thirty-sixth section invalidates the deed in a particular way. The statute contemplates the possibility of the names of some of the creditors being left out; for it provides that if they be left out, those creditors are not to be bound. There is no necessity that their names should be inserted, except for the interest of the debtor; because, if they were left out, he is not protected from being arrested by them. If the creditors are not named, they can treat the deed as a nullity.

MILFORD, J. Under the statute there is to be a schedule annexed to the deed, with the names of the creditors and the amounts due to them. This provision is merely directory—or, if not, it is explained by sect. 36, which says that every such deed shall be set aside at the instance of any creditor for any wilful and material error or omission in either of the schedules; it must, therefore, have been intended that if there was no wilful or material error in the schedule the deed was not to be invalidated, and not to be set aside, but was to be considered good. As the statute says, that it is to be set aside for certain circumstances, and these circumstances do not occur, I am of opinion that the deed is valid (b).

Judgment for the appellant.

(a) *s. 35.*

(b) *See next case.*

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SHOVELLER *against* RAMSAY.

June 21.

ACTION by bearer against the maker of two cheques drawn on the Australian Joint Stock Bank, Grafton. Averment of presentment and dishonour. Plea, by way of equitable defence, that after the delivery by the defendant to the plaintiff of the said cheques a certain deed of assignment was made, under the provisions of the 5 Vic., No. 9, between the plaintiff and the first part, *F. Parsons* and *R. Saddington* of the second part, and by a majority in number and value of the creditors of the plaintiff (not reckoning in number any creditor whose debt was under £50) of the third part, whereby the plaintiff assigned all his estate to *F. Parsons* and *R. Saddington*, as trustees for the benefit of all the creditors of the plaintiff in the manner (and stating truly where such deed was lying for inspection and execution), was within fourteen days next after such execution, published in the *Government Gazette* and one other newspaper published at Sydney, and whereunto was also annexed a true and particular account of all the property of the plaintiff, as required by the provisions of the said act. Averment, that by the execution of the said deed, and such publication as aforesaid, the property of the plaintiff and all his rights and credits, including all debts due to him, became vested in the trustees, and that since the execution of the deed the trustees have claimed the amount due on the said cheques from the defendant, and that the plaintiff is suing thereon without the consent and against the will of the trustees.

Demurrer and joinder.

Replication, that neither the Australian Joint Stock Bank, Grafton, nor the defendant, nor any other person

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was named in the true and particular account mentioned in the plea, as being indebted to the plaintiff or to his estate in respect of the cheques sued upon, or in respect of the money mentioned in the cheques, nor were such cheques or money included in the said true and particular account.

Demurrer and joinder.

Darley in support of the replication and the demurrer to the plea. The plea is bad as an equitable defence, for not showing circumstances under which a Court of Equity would grant an unconditional injunction against the plaintiff's claim; and it is not good as a legal defence, as the deed of assignment is not in accordance with the provisions of the act. By sect. 37, it has no effect until after execution "as aforesaid;" and the proviso of sect. 34, requiring that there shall be annexed to the deed a true and particular account of all the debtor's property, has not been fulfilled, as neither these cheques, nor the names of the bank, or of the defendants, were mentioned in such account. If, however, the plea is good, the replication is an answer to it. In *Threlkeld v. Cooper* (a), a plea similar to the present, but not alleging the publication of the assignment in the *Gazette* and in one Sydney newspaper as required by sect. 34, was held to be bad. *Tetley v. Taylor* (b), *Walter v. Adecock* (c), *Ex parte Morgan* (d), *Ex parte Rawlings* (e), and *Ex parte Godden* (f), were referred to.

Stephen in support of the plea and the demurrer to the replication. The plaintiff will not be allowed to say that the deed he has executed is invalidated by his own omission. [*Wise, J.* In order to make a deed of assignment void, sect. 36 requires that certain steps should be taken, which shows that unless they are taken, the deed is valid.]

(a) 27 June, 1860.
(c) 31 L. J. Ex. 380.
(e) Id. 27.

(b) 1 E. & B. 521.
(d) 32 L. J. Bankr. 15.
(f) Id. 37.

STEPHEN, C. J. I think the plea is good, and the replication bad. The defendant says, "you cannot sue upon these cheques, because all interest in them has passed to the trustees;" and I am of opinion that all such interest did pass to the trustees. The plaintiff says, in reply, "they did not pass, because they are not mentioned in the deed;" the omission to mention them not being by fraud, but by accident. I think the proposition relied on by the plaintiff cannot be maintained. The thirty-third section enacts that where a debtor shall execute an assignment to trustees of all his estate and effects whatsoever, for the benefit of all his creditors, to be named in a schedule annexed to such deed, with the amounts due to them, and such deed shall be executed in the way described, the person of such debtor shall be absolutely free from arrest in execution at the suit of any creditor named in such schedule, in respect of any debt or sum therein included. It seems to me that if the creditor is not named, the debtor is injured; for the statute provides that the debtor shall not be protected from all, but only from those who are named. It seems also to be implied that the name of the creditor might by accident be not mentioned. The act then provides by sect. 34 that the deed shall be executed, and its execution published in a specified way; and that there shall be annexed to every such deed a true and particular account of all the debtor's property. There is no doubt that these cheques are the debtor's property, and that they are not named. By these two sections, it seems to me that an assignment deed under the statute is to contain these things; and if it does not, the debtor will not obtain certain advantages. If it does not name the property as well as give it up, the debtor does not gain the benefit of the protection from arrest. The thirty-fifth section enacts under what circumstances the deed shall be void; and this tends to show that it was not intended to be void for any non-compliance with the directions contained in the previous section. Under sect. 36 the deed may be set aside at the instance of any creditor for any wilful and material error, or omission in either

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of the schedules,—or the debtor may be deprived of every benefit under the deed. If, therefore, under the deed the debtor shall have been released from all his debts, he might in this way be deprived of that benefit. But such a provision would not be necessary, if the deed was *ipso facto* void for these omissions. The thirty-seventh section enacts "that after the execution of any such deed as aforesaid," certain legal effects shall follow—it does not say a deed containing all these provisions. I am of opinion that this is such a deed in substance as was intended by the statute; and that the accidental omission of the name or property may deprive the debtor of certain advantages, but it does not invalidate the deed itself.

WISE, J. Under the thirty-fifth section, only the creditors named in the schedule are bound. But under the thirty-sixth section the deed may be set aside for fraud, or for any wilful and material error or omission in either of the schedules annexed to the assignment. It is necessary to look at the whole act and see whether the fulfilment of the directions is a condition precedent. To make the thirty-sixth section intelligible, I am of opinion that the deed would be valid for some purposes under the act, notwithstanding the omission in the schedule of the names of a creditor or of the property. The thirty-seventh section shows that after the execution of such a deed all property, wheresoever it may be, is transferred to the trustees. If the deed be not executed in compliance with sections 34 and 35, I give no opinion as to what would be the effect of such non-compliance upon the rights of the insolvent.

Judgment for the defendant.

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December 11,

1863.

August 6,
1864.*KELLY against BRADBRIDGE and another.*

THE declaration stated that an agreement was entered into between one *Long* and the plaintiff, for the performance of certain work by the plaintiff, for *Long*, for certain payment in that behalf, and that it was provided by the agreement that the payments therein specified were to be made upon certificates to be given by the defendants, and that the defendants undertook to act as architects under the agreement, and to inspect and examine the work, and to certify for the performance of the same. It then alleged that in pursuance of such undertaking and employment the defendants did examine and inspect the work as the same proceeded, and did, in part performance of their undertaking, from time to time, certify that the said work had been duly performed, upon which certificates money had been paid by *Long* to the plaintiff. It then averred the fulfilment of all conditions precedent, which would entitle the plaintiff to receive a certificate from the defendants, and that it was their duty to give the same. Breach, that the defendants fraudulently, maliciously, and without any good, reasonable, probable, or sufficient cause, refused to give the same in violation of their duty.

Demurrer and joinder.

Milford in support of the demurrer to the declaration. The declaration discloses no ground of action against the defendant, who is no party to the agreement between *Long* and the plaintiff. If there has been collusion between the architect and his employer (but none is alleged), the action may have lain against *Long* ; the work, and to certify for the performance

of the same. It then alleged that in pursuance of such undertaking and employment the defendants did examine and inspect the work as the same proceeded, and did, in part performance of their undertaking, from time to time, certify that the said work had been duly performed, upon which certificates money had been paid by *L.* to the plaintiff. Averment of fulfilment of all conditions precedent to entitle the plaintiff to receive a certificate from the defendants, and that it was their duty to give the same. Breach, that the defendants fraudulently, maliciously, and without any good, reasonable, probable, or sufficient cause, refused to give the same in violation of their duty. Held on demurrer that the action was not maintainable.

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Batterbury v. Vyse (a). In that case the declaration alleging "collusion" and "procurement" between these parties, was held to disclose a good ground of action, not against the architect, but against his employer, on the ground that these words imported fraud. And *Stadhard v. Lee* (b) is decided on the same principle; in that case there was an agreement between the plaintiff and the defendant that the former should do some work, and it was agreed that the defendant, if dissatisfied with the progress of the work, should have the absolute and unqualified power to put on additional hands and get the work done, and deduct the costs from the contract price. And it was held that so long as the defendant was acting *bona fide*, under an honest sense of dissatisfaction, although that dissatisfaction might be ill founded and unreasonable, he was entitled to insist upon the condition. But it is suggested that if the dissatisfaction had been dishonest, and the result of *mala fides*, he might have recovered. There also the action was against a party to the agreement. The plaintiff may have his remedy in a Court of Equity; *Scott v. Liverpool Corporation* (c). But the defendant owed no duty to anybody else than his employer. The allegation of fraudulent conduct in refusing certificate, amounts to nothing. What does it mean? or to what does it amount?

Isaacs in support of the declaration. The plaintiff relies on the maxim, *ubi jus ibi remedium*. As to the contract by the defendant, it must be taken that it was with the plaintiff; and if there was such a contract, there must have been a consideration, though it is not stated. If fraud or malice induced the refusal of the certificate, and both are alleged, surely the plaintiff must have some means of getting redress. [Stephen, C. J. The nearest case in principle is *Langridge v. Levy* (d), where the defendant sold a gun to A. for the use of himself and his sons, and falsely and fraudulently warranted its soundness, knowing it to be unsound, and the defendant

(a) 32 L. J. Ex. 177.

(b) 32 L. J. Q. B. 75.

(c) 27 L. J. Ch. 641: on appeal, 28 L. J. Ch. 230.

(d) 4 M. & W. 337.

was held liable to *A.'sson* for an injury done to him by its bursting, although the only contract was between the defendant and *A.* The ground of that judgment as stated by *Parke, B.*, is "that as there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time, as one of its results, the party guilty of the fraud is responsible to the party injured." *Wise, J.* That case is explained in *Longmead v. Holliday* (a).]

Milford in reply. *Langridge v. Levy* is explained in *Howard v. Shepherd* (b) by *Maule, J.*, in the following words, "in that case the Court held that the defendant knew that the son (the plaintiff) would use the gun, and put it on the ground of a false representation being made, to the prejudice of the person who acted upon it. It was put on the ground, not of breach of duty at all, but of tort." But in this case there is no case of deceit or fraudulent representation. [*Wise, J.*, referred to *Lumley v. Gye* (c).] *Broom's Legal Maxims* (d) was cited.

Cur. ad vult.

The judgment of the Court was now delivered by *Wise, J.* After stating the declaration as above, he continued:—

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The defendants have demurred to this declaration, and therefore for the purposes of our present decision it must be taken to be admitted that the plaintiff had done his work properly, and that the refusal to certify was not only without justification in fact, but that the defendants in so refusing were actuated by malice, that is, by some improper and indirect motive.

We have had several consultations upon this novel and difficult question raised by this demurrer, being anxious to decide in favour of the plaintiff's right to redress, if we could do so consistently with legal principles, should he be able to prove before a jury that the de-

(a) 6 Exch 766.

(b) 9 C. B. 312.

(c) 2 E. & B. 216; 22 L. J. Q. B. 483. (d) p. 704.

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fendants had been guilty of such gross misconduct. We have, however, finally come to the conclusion that the action is not maintainable. No doubt the first impression would be that inasmuch as the plaintiff had suffered a loss by the improper conduct of the defendants, he ought to have a remedy. But it is necessary to remember that every act causing loss is not injurious in a legal sense. Injury, in a legal sense, is that which prejudicially affects the rights of a person—either his general rights, such as his personal liberty, or his rights relatively to others, e.g., rights springing from contract, express or implied, or from some recognised duty towards him on the part of the person doing the injury. In the words of Sir J. Coleridge's judgment, in the case of *T. E. Rogers v. Rajendro Dutt* (a), "It is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining, that is, it must prejudicially affect him in some legal right—merely, that it will, however directly, do him harm in his interests, is not enough." It was true that this was said as to cases in which no "malice" was imputed; but we have found no authority for holding that a mere non-feasance, although with a bad motive, is actionable where there is no privity between the person omitting to do the act and the person injured by the act not being done.

In the present case the plaintiff had done work for Mr. Long, under a contract which gave him no legal claim to payment until the certificate of the architects was obtained. Until they had spoken no right existed, and their decision was final and conclusive. It is not alleged that the defendants were parties to the contract between the plaintiff and Mr. Long, nor yet that they induced the plaintiff to enter into it, in which case it might perhaps be held that they impliedly undertook to do nothing to prevent the plaintiff obtaining their honest judgment upon the work done under the contract—but merely that they undertook to act under the agreement, and to inspect and certify for the performance of the

work. Here there is no statement of any contract by the defendants with the plaintiff. He had already entered into the contract with *Long*; and to the contract between *Long* and the defendants the plaintiff is in no way privy. The declaration, indeed, states that it was their duty to certify; but this allegation is useless, if the facts previously set out do not show the duty,—and surplusage, if they do.

It could not be successfully contended that a builder could sue an architect under such a contract as this for any alleged want of skill on his part; because the builder and his employer do, by the agreement, select the architect to decide according to the judgment and skill which he has, and to attempt to raise before a jury any question as to his skill or the correctness of his judgment in valuing the work, would in effect be indirectly to obtain the decision of the jury upon the work itself, whereas the parties have bound themselves to abide by the decision of the architect alone.

No privity having existed, express or implied, between the plaintiff and the defendants at the inception of the contract, none arose from the defendants certifying as to a portion of the work, because the plaintiff was by virtue of his contract with *Long*, bound to perform the work. Then does the averment in the breach, that the refusal was malicious and fraudulent, make out a cause of action. Admitting to the fullest extent the doctrine laid down by Mr. Justice *Erle*, in *Lumley v. Gye* (a), that the procurement of a violation of a right is a cause of action in all instances where the violation is an actionable wrong, this case does not fall within it. The plaintiff, as already shown, had under his contract no right to payment by *Long*, and the effect of the defendants' refusal was only to prevent him from having the opportunity of acquiring a right; for even if the defendants had not been influenced by any malice or improper motive, and the averment were true that the plaintiff had done the work in such a manner as to entitle him to the certificate, it does not necessarily

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follow that the certificate would have been given. The defendants might have formed an erroneous opinion as to the work, and refused to certify; which case the plaintiff would be without remedy, because he had chosen to bind himself by a contract in clear, unambiguous terms, to rest his claims upon the certificate of the defendants. No instance of any such action as this was cited upon the argument, nor have we been able to discover any; and while we admit that—assuming, as we must do, that the averments in the declaration are true—the plaintiff seems to have suffered in consequence of the conduct of the defendants, yet to hold that an action would lie against a person for not doing something which he has in no way bound to do by any contract with or duty to the person who is thereby prevented from gaining some benefit by a contract which he has entered into with a third party, would be to transgress the bounds which the law has laid down, and would be establishing a new principle which would soon be found to be mischievous in its application.

That privity to the contract is, in general, necessary to give any right of action in respect of a breach of duty arising out of a contract is, we think, clear; *Tollitt v. Shenstone* (a), *Blakemore v. Bristol and Exeter Railway Co.* (b), *Howard v. Shepherd* (c), *Longmead v. Holliday* (d). *Langridge v. Levy* (e) is, indeed, often referred to as an instance to the contrary. But it has always been considered that that case was not to be extended in its application; and it has been frequently pointed out that the judgment was based upon the knowledge of the defendant, that the gun was to be used by the person injured, and that the injury was caused by reason of his false representation being acted upon; *Winterbottom v. Wright* (e), *Blakemore v. Bristol and Exeter Railway Co.* (b).

Under a contract like this, we apprehend that the plaintiff would not be without remedy if the architect

(a) 5 M. & W. 223.	(b) 27 L. J. Q. B. 167.
(c) 9 C. B. 312, per <i>Mawle</i> , J.	(d) 6 Exch. 786.
(e) 2 M. & W. 519; in Ex. Ch. 4 M. & W. 337.	
(f) 10 M. & W. 109.	

did misconduct himself in the manner alleged in the declaration, as a Court of Equity, whilst refusing to interfere with a contract however rash, would prevent any improper bias or fraud of an architect standing in the way of the builder's claim to recover for work done; *Ormes v. Beadle* (a), *Kemp v. Rose* (b), *Scott v. Corporation of Liverpool* (c). The observations of Lord *Chelmsford*, in giving judgment in the last case, would tend to support our present judgment; for, after referring to the powers of a Court of Equity in the event of an engineer misconducting himself under a contract similar to the present, his Lordship adds, "though a Court of Common Law might be powerless to afford any redress." It is worthy of notice also that in *Batterbury v. Vyse* (d), where an action was brought against an employer for having colluded with the architect to induce him to withhold his certificate from the builder, the architect was not joined.

Upon the whole, therefore, we are of opinion that the defendants are entitled to our judgment.

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(a) 2 Giffard 166. (b) 4 Jur. N. S.
(c) 25 L. J. Ch. 232; 28 L. J. Ch. 236. (d) 32 L. J. Ex. 177.

1864.

March 17.
August 6.RICHARDS *against* WHITFORD.

Trespass to a run. Plea, that the defendant was entitled to the possession of the land by virtue of a promise made by the Commissioner of Crown Lands on 31st January, 1862,

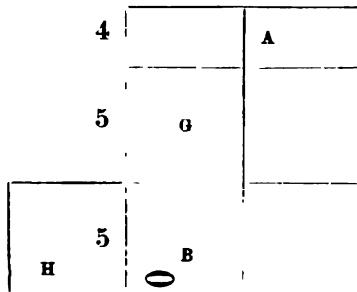
under the provisions of the Crown Lands' Occupation Act of 1861. Replication, that the plaintiff was entitled, by reason of possession under a promise by letter of the Commissioner of Crown Lands, in December, 1850, promising a lease of the said land; issue thereon. The letter on which the plaintiff relied was a letter to A., from whom the plaintiff purchased, and stated, "I am directed to forward for your information a description of the approved boundaries, subject to which the leases of the respective runs will be prepared." The enclosed description contained the *locus in quo*. On June 9th, 1852, the same Commissioner wrote to the plaintiff, stating that the description in the former letter was an error, and that the lease of the station would be amended, so as to exclude the *locus in quo*. In May, 1859, the defendant tendered for the *locus* thus excluded. The plaintiff lodged a *caveat*, and claimed the *locus*, stating that he had purchased it from A. on the faith of the Commissioner's letter. But the Commissioner of Crown Lands, in August, 1861, notified to the defendant the acceptance of his tender, and in January, 1862, notified that he had the authority of the Governor for occupying it.

Held, that the letter from the Commissioner of Crown Lands, in 1850, to A., was a contract, promise, or engagement, within sect. 28 of the Crown Lands' Occupation Act, and therefore equivalent to a lease.

Held, also, that although the 11th, 12th, or 13th sections of the Order in Council of May, 1847, may not have been complied with, the Governor has power to make a promise.

The Chief Commissioner of Crown Lands is an agent lawfully authorised to make a promise of a lease, within the 28th section of the Crown Lands' Occupation Act, 25 Vic., No. 2.

(a) The following is a sketch of the plan:—



Namoi. 5 5

The whole land delineated on the plan was claimed by the plaintiff as Yaraldool. The portion marked G was claimed by the defendant. The first plea was pleaded as to casual trespasses on land other than G. The second, and third, and fourth pleas were pleaded as to G. H was a run occupied by Purcell, the defendant's predecessor. B, the water-hole, the point referred to the Boundary Commissioner.

guilty; third—as to the same land mentioned in the second plea, not possessed; fourth, as to the same land, "that the said portion of the said close or cattle run is Crown lands, and that no lease from the Crown of the said land is in force, and that before, and at the time of the alleged trespasses, the defendant was in the occupation and enjoyment of the said lands, by virtue of a certain document dated the 30th day of August, 1861, and the 31st day of January, 1862, or one of them, under the hand of *A. O. Moriarty*, Chief Commissioner of Crown Lands, the said *A. O. Moriarty* being an agent of the Crown, lawfully authorised to act on behalf of the Queen, by which document, or one of them, the Crown authorised the defendant to occupy the said lands, and by the said documents, or one of them, promised, engaged, and contracted to grant, under the provisions of the Crown Lands' Occupation Act of 1861, for a term then and now unexpired, a lease of the said lands to the defendant, and the defendant relying upon such promise, engagement, and contract, has since the date of the said document so authorising the defendant to occupy the said lands, and so promising, engaging, and contracting to grant a lease of the said lands to the defendant, as in this plea mentioned, depastured the said lands with sheep, cattle, and horses, and has caused huts and other buildings to be erected thereon, as he lawfully might, for the reasons aforesaid, which are the alleged trespasses.

Replication, first—issue on second, third, and fourth pleas; second, to first plea, damages ultra; third, to the fourth plea, that before the signing by the said *A. O. Moriarty* of the document dated the 31st day of January, 1862, to wit, on the 18th day of December, A.D. 1850, *George Barney* being then an agent of the Crown in that behalf lawfully authorised, did promise, engage, and contract with *James Smith Adams*, for the granting to him, under the Order in Council referred to in the Crown Lands' Occupation Act of 1861, for a term which, at the time of the said trespass, was and still is unexpired, of a lease of the lands in the said

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plea mentioned, and during the said term the plaintiff purchased from the said *James Smith Adams* all his right, title, and interest in the said land, and the same was, with the sanction of the Government of this said Colony, duly transferred to the plaintiff by a document bearing date the 13th day of November, 1851, under the hand of the said *George Barney*, then being such duly authorised agent as aforesaid. Issue thereon.

The case was tried before *Wise*, J., in November, 1863. At the trial it was shown for the plaintiff that one *Adams*, the predecessor of the plaintiff, was in possession of Yaralool from 1847 to 1854, and that he claimed a piece of land measuring ten miles frontage to the river Namoi by fourteen miles back, and had occupied it with cattle, and that the plaintiff who succeeded him had occupied the same country, claiming fourteen miles back. *Purcell*, the predecessor of the defendant, occupied the neighbouring run of Torry Wee Waa (a) since 1848. It appeared that *Adams*' application for a lease of Yaralool, dated 10th March, 1848, contained, after stating the district, the name of the run, its estimated acreage and capability, the following description of the boundaries:—"On the east by a line running north five miles, joining Messrs. *Brown* and *Selwyn*'s run, Bucklebone, on the north by a line ten miles in extent, running parallel with the Namoi River, as far as the western line. On the south by the Namoi River ten miles in extent. On the west, on the north and south line five miles in extent, parting it from Mr. *Purcell*'s station."

Purcell's application, dated March 14, 1848, contained the following description of Torry Wee Waa:—"On the south by the Namoi River, on the east by a marked tree about half a mile east from the Torry Wee Waa water hole, and on the north and west by the lines as to be pointed out."

Purcell's application for a lease of Torry Wee Waa, published in the *Gazette* of September 20, 1848, claimed as one of the boundaries, "on the east by a

(a) Marked H. on the plan, page 110.

marked tree about half a mile east from the Torry Wee Waa water hole." *Adams* lodged a *caveat* against this description, on October 15th. The dispute was referred, under the statute, to the Boundary Commissioner, who, on January 10, 1850, reported as follows, after mentioning the parties:—"Situation and description of run for which a lease is recommended to issue. First, *J. S. Adams*' run, Yaraldool—on the north side of the Namoi River, having a frontage of ten miles to it, bounded on the east by the run of *Brown* and *Selwyn*, from a tree marked T *running north fourteen miles*; on the west from a line *running north and south fourteen miles*, the northern boundary line joining the east and west lines. On the west side joining *Purcell's* run, and dividing the water hole known as the Torry Wee Waa into equal parts (a). Second, *C. Purcell's* run, Torry Wee Waa—bounded on the south by the Namoi River, with five miles river frontage; on the east by Dr. *Adams*' run, Yaraldool; on the north at right angles by waste Government land; on the west by *R. Campbell's* station, formerly *Abercrombie's*, the line running north and south from a lagoon named Barraneal. The eastern boundary divides the water hole named Torry Wee Waa in equal parts. These parties having settled their disputes amicably, and paid their fees, I have the honour to recommend that their arrangements be sanctioned. *D. C. F. Scott*, District Boundary Commissioner."

In pursuance of this report, Colonel *Barney*, on December 18, 1850, wrote to *Adams* the following letter:—"His Excellency the Governor having been pleased to confirm the final report of the Commissioner appointed under Act of Council, 11 Vic., No. 61, to investigate the case of disputed boundary, *Adams v. Purcell*, I am directed to forward, for your information, a description of the approved boundaries, subject to which the leases of the respective runs will be prepared." The description was in the same words as in the Boundary Commissioner's report. On September 17, 1851,

(a) This description included both B and G on plan, p. 110.

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Adams wrote to the Commissioner requesting a transfer of Yaraldool to *Richards*, the plaintiff, and on November 13, 1851, Colonel *Barney* notified to *Richards* that *Adams*' interest in Yaraldool had been transferred, with the sanction of the Government. On February 5th, 1852, Mr. *Durbin*, the local Commissioner, in a letter to plaintiff, notifying that he had estimated the capabilities of Yaraldool, went on to say,—“I beg to enclose an amended description of your run, and I have to request you will at your earliest convenience have the vacancies left in the description filled up, &c.” The description enclosed was as follows:—“Bounded on the west by the Torry Wee Waa run, being a line commencing at a tree marked —, situate on the north bank of the Namoi River, at the centre of the Torry Wee Waa water hole, about five miles above the Torry Wee Waa present hut and stockyard, thence running north five miles to a tree marked; thence on the north by a line running easterly, parallel with, and five miles distant from the Namoi River, about ten miles to a tree marked; thence on the east by a line running south five miles to a tree marked,” &c. In reply to this, on February 20, 1852, *Richards* wrote to *Durbin* declining to fill up the vacancies, “inasmuch as the boundaries do not correspond with those reported by the Boundary Commissioner,” and enclosing a copy of such boundaries. On June 9th, 1852, the following letter was sent by Colonel *Barney* to *Richards*:—“It having been deemed necessary to refer to Mr. Boundary Commissioner *Scott*, on the subject of the description drawn up by him of the Yaraldool run, in your occupation, I now do myself the honour to inform you that it appears from that officer's report that the distance back from the river, stated to be fourteen miles, is an error, and that the lease of the station will be made out agreeably to the description sent in by Mr. *H. Adams*, and gazetted on the 20th September, 1848.”

On May 3, 1859, the defendant tendered for a lease for fourteen years of Barraneal, describing it as bounded on the west by my Torry Wee Waa back run, and on

the south by five miles of Mr. *Richards'* Yaraldoor run, thence on the east by a line north five miles, and on the north by a line west five miles to the north-east corner of the Torry Wee Waa (a). On May 29, *Richards* lodged a *caveat*, contending as he did at the trial that he was entitled to fourteen miles back, and that he had purchased Yaraldoor from *Adams* on the faith of Colonel *Barney*'s letter to him, of 18 December, 1850, containing such description. On this *caveat* Mr. *Moriarty*, the present Chief Commissioner of Crown Lands, made a report adverse to Mr. *Richards'* claim; and on the 30th August, 1861, he notified to Mr. *Whitford* that his tender had been accepted; and on 31st January, 1862, the Chief Commissioner wrote to *Whitford* that "the Colonial Treasurer having reported that you have paid into his hands the amount of the first year's rent to the 30th June next, for the run called Barraneal, &c., I have the honor to convey to you the authority of his Excellency the Governor for your occupying the said run, subject however to certain specified conditions."

The evidence showed that there had been disputes as to this block of land, and also some evidence of casual trespasses other than on the disputed block; and the jury found for the plaintiff with £50 damages *ultra* on the first plea, and £100 damages, on the other issues, for trespasses on Barraneal (the disputed block), as to which liberty was reserved to the defendant to move to enter the verdict for the defendant.

Darley, for the defendant, accordingly obtained a December 1. rule—first, on the ground that the damages on the first plea were excessive; and second, as to the other issues upon the points reserved, and also that the damages on these issues were excessive.

The *Attorney General* and *Darvall*, Q. C., showed cause. The damages are not excessive—as it is a serious mischief to have the right called into question. There was evidence that the defendant endeavoured to force

(a) This is the part marked G on plan, p. 110.

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the plaintiff to buy this land, and the jury were justified in considering that the defendant had been guilty of contrivance and overreaching. *Williams v. Currie* (a), and *Mayne on Damages* (b) was referred to.

The verdict for the plaintiff is also right, on the replication to the second, third, and fourth pleas. The replication stated that the land in question was promised to the plaintiff, or rather to *Adams*, from whom he purchased it, before the promise relied on by the defendant was made; and under the twenty-eighth section of the Crown Lands Occupation Act (c), that prior promise is equivalent to a lease. The plaintiff has nothing to do with the original application made by *Adams*, and of which he knew nothing when he purchased from *Adams*. But he relies on the letter of 18th December, 1850, from Colonel *Barney*, the then Commissioner of Crown Lands, to *Adams*, which purports to be with the express authority of His Excellency the Governor, as being a distinct promise within the meaning of that section. [Stephen, C. J. For what term or period of lease?] The letter of 13th November, 1851, approved of the transfer from *Adams* to the plaintiff of this run. It must be taken, therefore, that a lease issued in 1850, and that lease stands good until the Crown takes some appropriate step, by *scire facias* or otherwise, to set it aside. Assuming that the Crown were in a position to ask a Court of Equity to remodel the lease, until it be remodelled the plaintiff must recover. But as against the plaintiff, who is an innocent purchaser, who bought on the faith of these documents, and who was not cognizant of the mistake, assuming that there is one, a

(a) 1 C. B. 841.

(b) p. 347.

(c) Section 28 of the Crown Lands Occupation Act, 25 Vic., No. 2, is as follows:— “In any action or suit brought to recover possession, or to recover damages for trespass upon or otherwise in relation to any Crown lands, of which no lease from the Crown shall be in force, it shall be lawful for any party thereto to plead and put in evidence any promise, engagement, or contract, from or with the Crown, or its agents lawfully authorized for the granting under the Orders in Council or under this Act for any term unexpired of a lease of such lands; and such promise, engagement, or contract shall, as between the parties in such action or suit, have the same effect as if a lease from the Crown of such lands had been duly issued in pursuance of such promise, engagement, or contract to the party entitled thereunder to such lease.

Court of Equity would not grant any such relief, whatever it might do as against *Adams*. The plaintiff also relies on the Land Regulations of 1861 (a).

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Sir *W. Manning*, Q.C, and *Darley* contra. The defendant tendered for this as a new run, and under the 13th section of the Orders in Council of March 9, 1847, and if only one tender be sent in he was entitled to a lease of this land as a matter of law. He therefore had a clear title by promise, and in effect by lease, unless under the recent Act the promise to the plaintiff, of 1850, had legal priority. But as between the Crown and the plaintiff the latter was only entitled to five miles back, the Crown had a right to grant a lease to, and to accept the tender of, any one else for the back blocks beyond the five miles. The question is whether at the time of the defendant's tender for this land, in 1859, or its acceptance in 1861, there was any agreement, contract, or promise by the Crown with any one else in respect to it. The twenty-eighth section can only refer to an agreement or promise which the Crown or its officers had power to make. Under the 5 and 6 Vic., c. 36, sect. 17, only licenses for one year could be granted. The 9 and 10 Vic., c. 104, sect. 1, empowered Her Majesty to grant leases or licenses for the occupation of the waste lands for not exceeding fourteen years; provided that Her Majesty should reserve upon such demise or license any such rent as should be authorized, by the Orders in Council. Her Majesty empowered the Governor to make such leases or licenses; but she could not depute a greater power than she herself possessed, she could not

(a) They provide that "unexpired leases, granted or promised under Her Majesty's Orders in Council, previously to the 22nd of February, 1858, will, unless where the lands have been, or may hereafter be legally withdrawn from lease, remain in force for the full terms, and subject to the conditions prescribed by former Regulations, and by the Act, viz.:—First, leases of runs of the unsettled class, held under license or granted by tender prior to the 1st of January, 1852, for fourteen years from that date. Second, leases of runs in the unsettled districts, or in the second class settled districts (formerly intermediate), taken up by tender between the 1st January, 1852, and 22nd February, 1858, for fourteen or eight years respectively, from the date of the first payment of rent under the accepted tender."

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empower him to make the leases or license without re-serving such rent. The Governor, therefore, had no power to grant or promise a lease for more than one year, unless it were a lease subject to the Orders in Council. The eleventh section (*a*) of the Orders in Council, of March, 1847, which related to old runs, was the section under which *Adams* was entitled, and under it no one but occupants who had been in licensed occupation of their lands, were entitled to apply for leases. In *Adams*' application, dated 10th March, 1848, he alleged that he was only in licensed occupation of five miles back, and therefore if he was in unlicensed occupation of more, he has lost his right to lease for that part by not sending in an application under the Orders in Council for such part. He sent in his application in time for the five miles back, but only for that, and his lease was accordingly so limited. The lease also is only to be of land of which he is the licensed occupant, and there was no evidence that he was licensed beyond the five miles. The Crown never intended to give a lease of whatever land was occupied, but only of that occupied under a license. And further, the officers of the Crown had no power to promise a lease of land of which the party tendering was not in licensed occupation. If Colonel *Barney* gave a promise of land not so occupied it was *ultra vires*. [Wise, J. If so, in every instance, the case could be unripped where the party had not been in occupation, and it would be allowable to go behind the lease and enquire whether the party interested was in licensed occupation.] *Adams*, and those claiming under him, cannot be heard to say that

This section is as follows:—"All occupants of Crown lands who shall have been in licensed occupation of the same for at least one year, at the time when this Order in Council shall come into effect, are to be entitled to demand leases of their respective runs under the present regulations, within six months from the date of the publication of this Order in Council by the Governor or other officer administering the Government of the said Colony, but not afterwards; and all occupants who have been in licensed occupation of their lands for a shorter period than the term of one year, shall be entitled, upon the expiration of the same term of one year, without having forfeited their respective licenses, to demand leases of their respective runs, under the regulations herein contained; provided such lease shall be lawfully demanded within six months after the expiration of the said term of one year, but not afterwards."

he was in occupation of more land than he himself says he did occupy, and of which he claimed a lease, namely, a run ten miles by five miles, and he therefore could not obtain, nor could the Government legally grant a largely increased area. [Stephen, C.J. The promise of ten miles by fourteen miles seems to have been either a fraud or a mistake. But is not the plaintiff entitled to hold by it, notwithstanding? The Governor seems to have power to give a lease of more than a squatter holds, if he thinks fit, see sect. 1.] It is also contended that the promise referred to in the twenty-fourth section must be "from or with the Crown or its agent lawfully authorized," that is, lawfully authorized by the Orders in Council to make such promise; and accordingly, unless Colonel *Barney* was an agent lawfully authorized by the Orders in Council to make that promise, it is void.

If, however, the letter of Colonel *Barney* can be considered a promise of a lease of a new run, in such case, under the thirteenth section of the Orders in Council, certain conditions must be fulfilled before the occupant is entitled to a lease of a new run: he "shall set forth in his tender a clear description of the run for which he applies, and of the boundaries of the same, and shall state whether, beyond the amount of rent to be ascertained, as hereinbefore provided, he is willing to offer any, and if any, what amount of premium for the lease;" but here the back block was never described; no rent was ever paid or offered for it; the term of years for which he proposed to take it was never stated by *Adams*; and therefore neither the Crown or the Governor had power to make a lease, and the document of 18th December, 1850, could not operate as to this block. Assuming, therefore, that Colonel *Barney's* letter was a promise under sect. 13, it was *ultra vires*, and therefore not a promise within sect. 28.

But even if the Governor had issued a lease for fourteen years, and it was afterwards discovered to have issued under a mistake, either the lease would be void so far, that is as to the excess, or a *scire facias* might

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issue to repeal it. But the letter to *Adams*, which gave him fourteen, instead of five miles, was, as to the particular land in question, a mistake; and it was intended that the plaintiff should only have ten miles by five, not as by the mistake in the letter is stated ten miles by fourteen; and he cannot set up this mere promise, that promise having at the time no legal operation, to defeat the defendant's tender, which, with its acceptance, entitled the defendant to this land. The letter contained no binding promise, and was indeed in excess of the power of the Crown itself. The mistake arose in the following manner:—There was a dispute between *Purcell*, the present defendant's predecessor, and *Adams*, which related solely to a point on the river, and not in any way to the back blocks. This dispute was referred to the Boundary Commissioner, and he reported that an arrangement between the parties should be sanctioned; at the same time enclosing a description of the respective boundaries—and in this description first appears the mistake. In pursuance of this report the Chief Commissioner writes the letter of December, 1850, containing the same erroneous description, and this letter is now relied on by the plaintiff as a promise. But the twenty-eighth section does not revive or give effect to any promise no longer subsisting, but annulled, recalled, or otherwise put an end to, as the plaintiff's was, by the acceptance of the defendant's tender.

The plaintiff's run, in 1852, was estimated then to carry 800 head of cattle only, and the plaintiff has never paid any greater assessment. [*Stephen*, C.J. But he is not shown even to have admitted, since 1850, that his run only extended back for five miles.] The plaintiff is informed that the fourteen miles was an error, and that he was only to be allowed five in his lease, and he is told that if he wanted more that he should tender for the extra quantity as unoccupied. Instead of doing so he leaves it for the defendant to send in one, which is accepted. If the promise by letter, in 1850, was efficacious, surely the recall of the promise by letter in 1852, especially after proof of the utter mistake

and want of intention, would be equally so. The Legislature never could have meant to set up irrevocably every mistaken discretion and blunder of a clerk. The damages are excessive—no substantial damage was proved. But the jury have given damages because the defendant did what he was perfectly entitled to do, tendered for land occupied by the plaintiff without authority. [Stephen, C.J. It seems to me that we cannot disturb the verdict on this ground, even if we see clearly that the amount was too much. It is certainly not an outrageous excess, and there is nothing to shock the sense, although the £50 which the defendant paid into Court, would, in my judgment, have fully met the justice of the case, as the plaintiff is hardly a meritorious claimant, all the circumstances being considered. On the other points we will take time to consider.]

Cur. ad. vult.

The judgment of the Court was now delivered by MILFORD, J. This case was tried before Mr. Justice Wise, on 18th and 19th of November last. It was an action for trespassing on the plaintiff's runs of Barraneal, part of Yaralool, having a frontage of 10 miles on the Namoi River, and extending fourteen miles back. The defendant, as to part of the runs, admitted the trespass, and paid £50 into Court, but as to the remainder of the land said to have been trespassed on, he pleaded that it was not the plaintiff's, and he claimed to be entitled to the possession of that part of the runs, by virtue of a promise made by the Commissioner of Crown Lands on the 31st January, 1862, under the provisions of the Crown Lands Occupation Act, of 1861. The plaintiff asserted his right to the land in question, by reason of possession under a promise by letter of the Commissioner of Crown Lands, in December, 1850, promising a lease of it. A verdict was found for the plaintiff, with £100 damages.

Some points were reserved by the Judge at the trial, and a new trial was moved for on the grounds that the damages were excessive, and that the defendant is en-

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titled to the land in question by reason of the promise of 1862.

We are clearly of opinion that we cannot interfere with the verdict as to the amount of damages, if the plaintiff be entitled to any ; they may or may not be, in our opinion, more than sufficient to compensate for the damage done, but at all events they are not so excessive as to authorise the interference of the Court.

The question whether the plaintiff or defendant is entitled to the possession of the land in dispute, depends on the 28th section of the Crown Lands Occupation Act of 1861, which is as follows :—" In any action brought to recover damages for trespasses upon or in relation to any Crown land, of which no lease from the Crown shall be in force, it shall be lawful for any party thereto to plead and put in evidence any promise, engagement, or contract from or with the Crown, or its agents lawfully authorised for the granting under the Orders in Council for any term unexpired of a lease of such lands ; and such promise, engagement, or contract shall (as between the parties in such action) have the same effect as if a lease from the Crown of such land had been duly issued in pursuance thereof to the party entitled thereunder to such lease."

The letter from the Commissioner of Crown Lands in 1850, to Mr. *Adams*, from whom the plaintiff claims, was binding on the Crown as a contract, and could not be recalled, except it were actually void, or except it were voidable, and subsequently made void. The promise was *prima facie* good and binding; but whether there was any ground for rendering the promise void we cannot tell. If there were, it was never established against *Adams* or the present plaintiff, nor has either of them admitted such to have been the case. If then in pursuance of a promise made and still in force, a lease had been granted that could not be set aside, except by a suit establishing some equitable ground for that being done ; the consequence is, that in this action it must be treated as a lease ; and as it has not been set aside as a

valid lease, it therefore necessarily has precedence before the promise of 1862.

There was no question raised at the trial as to the extent of the term promised, which must be taken to be for fourteen years, or at all events for a period not expired when the action was brought. On behalf of the defendant, it was urged that the requirements of the 11, 12, and 13 sections of the Orders in Council, which came into operation in October, 1847, not having been complied with, the Governor had no power to make any promise. Now, it is clear, that unless his power be restrained by those sections, he possessed it. They do not appear to us to have this effect; all that they do is to give certain privileges and rights to persons desirous of obtaining runs, but do not interfere with the power of the Governor when it does not clash with those privileges or rights. The 11th section appears not to have been complied with by *Adams* or the plaintiff, therefore they could not have demanded a lease of the land in their possession, in October, 1847; but it does not prohibit the acquisition of a lease, license, or promise in any other way. The 12th and 13th sections do not apply to the case of a run occupied when the Orders of Council came into operation; the former only applying to cases of forfeited runs, and runs afterwards having become vacant, and the latter to new runs never occupied before.

The only requirements of the 28th section of the Land Occupation Act are, that there should be no lease of the land in question in force, and there is none; and that the promise should have been made by the Crown, or its "agents lawfully authorised." We are of opinion that the Chief Commissioner of Crown Lands was an agent who was authorised to make a promise of a lease. If he were not, to whom does the expression in this section of the Act apply "agent lawfully authorised"? Whether the lease when granted is to be made by the Governor, we need not decide; but there is nothing to prevent his making promises by his agent. If the Governor had power to grant leases for fourteen years, as he had, surely he had a power to promise to do

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so, and that he could do by an agent, and thereby render himself liable to fulfil the promise.

It appears to us, therefore, that the plaintiff has established his right to the possession of the land in dispute, and the rule must be discharged with costs.

Rule discharged.

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Where the writ of summons stated that it was issued in an action at the suit of (naming the plaintiffs) as directors of the M. & N. M. C. Co. and the declaration was their own right; the declaration was ordered to be amended so as to correspond with the summons.

DARLEY, for the defendant, moved to set aside an order of *Milford*, J., dismissing with costs the defendant's application to compel the plaintiffs to amend their declaration by adding the words "as directors of the Melbourne and Newcastle Minmi Colliery Company." The writ of summons commencing the action stated that it was issued "in an action at the suit of (naming the plaintiffs) as directors of the Melbourne and Newcastle Minmi Colliery Company," and the affidavit upon which the plaintiffs obtained a *ca. re.* and the writ of *capias* itself were all headed in the same way with the plaintiffs' names "as directors;" but the declaration was in their own right. He submitted that the declaration must disclose the character in which they sue. The rule is, that where the process is particular, the declaration must correspond; *Anonymous* (a), *Ashworth v. Ryal* (b). *Kitchen v. Brooks* (c) is an authority that this is the proper way of taking the objection.

Salamons contra. The allegation as directors is not descriptive of any representative character, and is therefore immaterial. If it were inserted and then traversed the plea would be demurrable. Rule 40 (d) of April, 1856, was then referred to.

Darley in reply. It is possible there may have been a contract in which the plaintiffs have been contracted with as directors, and in that character; and if these words

(a) 1 Dowl. 97.
(c) 5 M. & W. 522.

(b) 1 B. & Ad. 19.
(d) p. 71.

are inserted in the declaration the defendants may have the benefit of a set-off against them in that character, of which they may be deprived if they sue as individuals. [Stephen, C.J. If the plaintiffs have no authority to sue for the company, they cannot sue as directors, they may be called so, but the contract is with them individually. The contract is with *A.* as director and because he is a director, but the question would be whether the contract be made with him and it would be immaterial whether he be or be not a director, for he could only sue because he is the contractee.]

STEPHEN, C.J. In this case the plaintiffs sued out the writ of summons "as directors," why, I cannot tell. They could not thus sue without some statute having incorporated them, and if they were incorporated, they could only do so because the charter incorporated them by name. If there be no statute applicable to the case, the plaintiffs cannot sue unless the contract was made with them. If the contract was made with them because they were directors, yet they must sue in their own name as individuals. If one of the plaintiffs were not shown to be a director, that would not deprive the other plaintiffs of their right of action. I do not think, although it is not necessary to decide the point, that it is necessary to state that the contract was made with them as directors. It has been argued, however, that unless stated in the declaration, the defendant might be deprived of a right of set-off as against them as directors; as for instance, if the company had done the defendant some wrong, it is possible that the latter might have some such right of set-off; I therefore think that the writ of summons and the declaration ought to be made to correspond. If the plaintiffs sustain any inconvenience, it is because they have recognised their character as directors once and are now disclaiming it, and also the responsibility involved in it.

WISE, J. I am of the same opinion. Where the writ is special the declaration must be special too. I

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thought at first that the words "as directors" might be considered as mere surplusage, but, on reflection, it seems to me that it may be that the plaintiffs are suing in their representative character, and as the writ says so, the defendant is entitled to have the declaration also so framed. Suppose two contracts, one made with them individually, and the other with them as directors, and that the declaration were general, the defendant would not know upon which contract they were suing. I think the plaintiff was bound to declare as he sued.

As the motion before the learned Judge was dismissed with costs, the present order will be that that order be rescinded and the amendment made as asked for. The costs of the application in chambers, and of this application to be defendant's costs in the cause.

Order accordingly.

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WALKER *against* BUCHANAN.

The successful party on taxation will not be allowed the expense of making a survey of the land in dispute, preparatory to the making of a plan for use on the trial.

STEPHEN, for the plaintiff, moved that the prothonotary be directed to review his taxation of the plaintiff's costs. It was a squatting action in which the plaintiff had obtained a verdict. On taxation of the plaintiff's costs the prothonotary had, on the authority of *Hay v. Cameron* (a), disallowed an item charged, as

(a) 12 April, 1861.—Before *Stephen*, C.J., and *Wise*, J.—The question was whether there should be allowed to the successful party, on taxation, the expense of making a survey of the land, as preparatory to the making of a plan for use on the trial.

Martin contended that no such expense can properly be allowed. The only items that ought to be allowed are those which are incurred "in and about the suit;" which the making of a survey is certainly not. The principle is, that, no expense will be allowed to any witness "merely to qualify him for giving evidence;" *May v. Selby* *. In *Ormerod v. Thompson*, † *Pollock*, C.B., in giving his judgment says, "The cost of all evidence which naturally exists, as to any issue, will be allowed, but not the expense of artificial discovery by experiment." *Gravatt v. Attwood*;‡ is an authority to the same effect. [Stephen, C.J. But plans made for the information of the Court will be allowed; *Holmes v. Holmes*.§] He also referred to *Lang v. Boices*,|| *Olive v. Severn*,¶ *Pilgrim v. The Southampton and Dorchester R. Co.*,** *Lumb v. Simpson*.††

Fawcett contra. It was necessary to show where certain streams and lines ran, and what were the distances between such and such places, for

* 1 Dowl., P. C. N. S. 708; S. C. 4 M. & G. 142; 4 Sc. N. R. 727.

† 16 M. & W. 560. : 21 L. J. Q. B. 215. § 2 Bing. 75. || 3 M. & S. 89.

¶ 3 B. & B. 27.

‡ 8 C. B. 26. || 4 Exch. 85.

having been paid by the plaintiff to a surveyor for surveying the country in dispute in the action and for attending as a witness at the trial. The question is whether *Hay v. Cameron* is to be considered as overruling *Mallady v. Bradley* (a).

Butler, for the defendant, was not called on.

Per Curiam. The question is settled by *Cameron v. Hay*.

Rule discharged with costs.

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THE QUEEN *against* JOHN PHEGAN.

August 6.

THE prisoner was tried and convicted at the Braidwood Quarter Sessions, in November, 1863, before the learned District Court Judge *Callaghan*, lately deceased, on an information which charged the prisoner with feloniously forging "a certain cheque, which said forged cheque purports to be drawn and signed by *S. H. Morrisey*, on the Commercial Banking Company of Sydney, Goulburn, in favor of Mr. *Phegan* or bearer, for the sum of £47 sterling, with intent thereby them to defraud." There was a second count for uttering in similar terms. At the trial objection was taken to the sufficiency of the information, and the learned District Court Judge said that he would reserve the point under the 13 Vic., No. 8. But the learned Judge having died before the case was stated, Mr. *Innes*, who had acted as Crown

Semblé—In an information for forgery, the allegation that the prisoner forged "a certain cheque which forged cheque purports to be drawn and signed by M. on the Commercial Banking Company, &c., in favor of P. or bearer for £47" is a sufficient description of the instrument forged.

the information of the jury. [Stephen, C.J. A distinction seems to me clearly to exist between experiments and other media of evidence and purposes of discovery or illustration, or to enable the witness to give evidence, and surveys with plans or models for purposes of explanation to the jury, and only to help them to understand other evidence in the case.] *Mallady v. Bradley*, * and an affidavit made by the attorney, were referred to.

Cur ad. vult.

Per Curiam. [Milford, J., being called in by consent, and concurring with Wise, J.] The cost of the survey cannot be allowed.

STEPHEN, C.J. I dissent from the majority of the Court, for if a plan be necessary, and for that reason allowed, how can the survey made only for the purpose of the plan be disallowed?

* Steph. Supp. 109.

(a) Step. Supp. 109.

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Prosecutor at the trial, at the instance of the prisoner, brought the matter under the consideration of the Judges.

STEPHEN, C.J. In this case, which, of necessity, comes before us irregularly, because of the death of the learned District Judge *Callaghan*, before the time when he was to state the case, the question is whether the following information is good. [The learned Judge read the information.] The words used by the statute, 1 W. IV., c. 66, sect. 3, are "any undertaking, warrant, or order for the payment of money." The case has not been argued, but we have all considered it, and think that the proper mode is to describe such an instrument "an order for the payment of money;" and if these words had been used it would have been sufficient. But, in order to prevent justice from being defeated by clerical or verbal inaccuracies, it is enacted by the 2 & 3 W. IV., c. 123, sect. 3, "that in all informations for forging or in any manner uttering any instrument or writing, it shall be sufficient to describe the same in such manner as would sustain an indictment for stealing the same." We think that this instrument is insufficiently described as to its purport. We all have also doubted whether the description is sufficient, and we still do not think the case clear. But according to a recent decision in *R. v. Godfrey* (a), we are compelled to hold this description sufficient. In that case the indictment alleged that the prisoner by means of false pretences obtained "from A. a cheque for the sum of £8 14s. 6d. of the monies of B.;" and it being argued that the indictment did not state to whom the cheque belonged, and that the words "of the monies of B." referred to the proceeds of the cheque and not to the cheque itself; Lord *Campbell* asked, "May not the cheque be considered money, and is not this an averment that the cheque, *valeat quantum*, is of the moneys of the prosecutor? If, he adds, it had said it was the cheque of B. it would have done, it is in fact so said." And *Martin*, B., said, "I should have thought that the cheque was, for this purpose, money; but, if not, you

may strike out the words 'of the moneys,' and then the allegation is, that the cheque was the cheque of *B.*" It was then held, that the description in question was a sufficient allegation that the cheque was the property of *B.*, in an information for cheating. But if it is sufficient in an information for cheating, it would be sufficient in an information for larceny, and, if so, it is also sufficient in an information for forgery. The present point has been considered by all of us, although not reserved under the statute, and we all concur in the decision that the conviction must be sustained.

WISE, J. concurred.

Conviction sustained.

THE QUEEN *against* CHESHIRE.

June 14.

SPECIAL case, under 13 Vic., No. 8, sect. 2.

"The prisoner was convicted before me, at Bathurst, on the 16th of April last, of feloniously receiving certain stolen bank notes. The property of the notes was laid in one count in *Henry Rotton*, and in a second in *Henry McCrummen Keightley*. After hearing the evidence, however, I directed the latter count to be amended by substituting the name of *William Crisp Peachey*.

The notes in question formed part of a large number which came into the possession of *Hall and Vane's* gang of bushrangers under the following circumstances:—

On the 24th October, 1863, the bushrangers, five in number attacked *Keightley's* house, at Dunn's plains, in the neighbourhood of Bathurst, all being armed; and after several shots had been fired, and one of the gang killed by *Keightley*, he and *Peachey* (who was a visitor there) surrendered themselves. A conversation then took place between the bushrangers, and between them

Some bushrangers having captured K. & P., threatened to murder K. unless K. gave them £500. It was then arranged that the bushrangers should keep K. in custody until ten o'clock the following morning, when they said they would shoot him unless P. should go to R., the father-in-law of K. and obtain the money, and return with it to the bushrangers before that time. P. went with Mrs. K. to R., who obtained the money, and

gave it to P., and P. then went to the place where K. was in custody. The bushrangers having asked P. whether he had the money, he said "yes," and threw it to one of the bushrangers, who put it in his pocket; the bushrangers then rode away, leaving both K. and P. at liberty. Held, that the offence was certainly larceny, if not robbery, as against P. *Sensible*, it was also larceny as against R.

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and Mrs. *Keightley* in *Peachey*'s presence, the effect of which was, according to the witness *Peachey*, that some arrangement had been made, in *Peachey*'s absence, between them (the bushrangers) and *Keightley*, that Mr. *Keightley* should give them £500, and that the witness should drive in to Mr. *Rotton* (Mrs. *Keightley*'s father) and fetch it. One of the men had previously threatened *Keightley* with death, for having shot their comrade. Another of the gang told *Peachey*, that if the money was not brought the next morning by ten o'clock, *Keightley* would be shot.

Peachey then went in a gig with Mrs. *Keightley* to Mr. *Rotton*'s residence at Bathurst, where Mrs. *Keightley* made a communication to her father. He instantly went to the Bathurst Bank, and procured there £500 in notes, with which Mr. *Peachey* and Mr. *Rotton* proceeded to *Keightley*'s house, arriving there before ten. *Peachey* and *Rotton* found on the premises neither *Keightley* or the bushrangers; and in consequence of what a servant there told him, *Rotton* did not go further with *Peachey*. The latter alone therefore proceeded up the hill to the place where *Keightley* had remained all night in custody of the bushrangers; Mr. *Rotton* previously counting out and delivering the £500 in notes to *Peachey*.

On the way, Mr. *Peachey* was met by two of the bushrangers (still armed), one of whom asked, "Have you brought the money?"—*Peachey* replied, "Yes; will you set Mr. *Keightley* at liberty?" The man answered, "He is all right, you can come and see where he is." Upon arriving at the spot where *Keightley* and the bushrangers were, *Keightley* said to *Peachey*, "Have you got the money?" *Peachey* answered "Yes," and immediately threw the money to one of the bushrangers. The latter, after partly counting it, put the whole in his pocket. The bushrangers then packed up their blankets, and rode away, armed as before, leaving both *Keightley* and *Peachey* at liberty.

Mr. *Rotton*'s evidence was, that after *Peachey*'s coming, with Mrs. *Keightley*, to him at Bathurst, he went to the bank in consequence of a communication made to him by them, and procured one hundred £5 bank notes and then

drove with *Peachey* to *Keightley's* house at Dunn's plains. He said, "I was going to deliver the money myself to some individuals of whom Dr. *Peachey* had told me something. But in consequence of what was said to me at *Keightley's*, I did not go. It was said to me in *Keightley's* yard, * * * I therefore went to Dr. *Peachey*, who was in the next room, and took down in his presence the numbers of the notes, and then handed them to him. Did not tell him what to do with them. He knew that. Handed them to him in consequence of what he had told me in the morning * * not thinking it safe to deliver the money myself."

There was ample testimony, tracing certain of these notes to the prisoner's possession in Bathurst, six days after the occurrence; and tending strongly to prove his knowledge of the transaction here related. But the only question reserved is, as to the offence of the principals. In my charge I told the jury that if the bushrangers, or any of them, stipulated with *Keightley* for £500 as the ransom for his life, or if any arrangement of that character was made and if *Rotton* gave the money into Dr. *Peachey's* charge in order to carry out that arrangement and thereby save *Keightley* from assassination, and if Dr. *Peachey* as his agent—or as the person having the sum lawfully in possession—gave over the money under that compulsion, and with the impression that, if it was not delivered, *Keightley's* life would be the sacrifice—the receipt of the £500 by the bushrangers, at the time and under the circumstances stated by Dr. *Peachey*, was a larceny.

The question for the Court is, whether the charge thus given was right?

As to the knowledge by this prisoner of the transaction, I said this was a question for the jury, taking all the circumstances into their consideration. I thought it unnecessary to say whether the larceny was of the goods of *Rotton*, or of *Peachey*; as the notes might be deemed still the property of *Rotton*, although also at the moment of delivery the property of *Peachey*, as his agent.

The particulars of the communication made to Mr. *Rotton* by his daughter and *Peachey*, and also of the

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communication made to the former at *Keightley's* by the servant, and also all inquiry from *Rotton* as to the motives which led him to part with his money, and whether, in fact, he was under apprehension when he procured the notes, and when he handed them over to *Peachey*, were shut out on objections taken by the prisoner's counsel.

“ ALFRED STEPHEN.”

Innes, for the prisoner. The offence proved is robbery or nothing ; and if the prisoner is not guilty of robbery, he must be discharged, and is submitted that he cannot be convicted of robbery. Robbery is a felonious taking of money, &c., from the person of another or in his presence against his will, by violence, or putting him in fear and that fear according to Mr. *East* (*a*), is not, on the one hand, confined to an apprehension of bodily injury, and, on the other, it must be of such a nature as, in reason and common experience, is likely to induce a person to part with his property against his will, and to put him as it were under a temporary suspension of the power of exercising it, through the influence of the terror impressed, in which case, fear supplies the place of force. But it is submitted that that fear must operate upon the person robbed. The property in these notes is laid in *Rotton* and in *Peachey* alone ; but *Keightley* was the person in distress, and he was put in fear. It is for this reason that it has been held that the obtaining money from a wife, under a threat of accusing her husband of an unnatural crime, is not robbery, *R. v. Edwards* (*b*). “ To make,” said *Littledale*, J., “ a case of this kind a robbery, the intimidation should be on the mind of the person threatened to be accused, and the apprehension of the wife was of a different character.” [*Wise*, J. Was not *Peachey* under the influence of fear, not only on account of the risk in which *Keightley* was placed, but also on his own account, at the moment he gave up the money ? If he had then refused, what would have been the consequence ? Was not that money taken

by armed bushrangers, taken by violence ?] *Jackson* and *Shipley's* case (*a*) is an authority that to constitute robbery, the money must be parted with from an immediate apprehension of present danger, and not after the parties have separated and the party robbed has had time to deliberate upon it, and apply for assistance; because, in such case, the circumstances had more an appearance of a composition of a prosecution than it had of robbery. Here there was no continuing fear operating upon *Peachey* from the time the money was demanded till it was paid, as is said to be necessary in *Jackson's* case; and in the interval he might have procured assistance and taken advice.

The *Attorney-General*, for the Crown. Even the taking up and appropriating lost property with knowledge, or means of knowledge of the owner, is larceny; and the getting possession of money by some trick, or fraudulent contrivance of any kind, is larceny. If by the threat held out without the slightest justification, the possession of money or goods is parted with and obtained by that species of fraud, the property in such money or goods is not changed, and the appropriation is larceny. Thus in *R. v. Thompson* (*b*) where a lady wishing to get a railway ticket, and finding a crowd at the ticket office, asked the prisoner who was nearer to it, to get a ticket for her, and handed him a sovereign to pay for it. The price of the ticket was ten shillings. He took it, intending to steal it, and, instead of getting the ticket, ran away with the money; and he was held to have been guilty of larceny, on the ground that the lady retained the possession of the money, in point of law, notwithstanding this delivery. So in this case, there was a fraudulent contrivance by means of which the bushrangers got possession of the money, the property in which never passed to them; and therefore it was a clear larceny, whether the property in the money is laid in *Rotton*, or *Peachey* who was his agent. But it

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(*a*) 1 East P. C. App. 21.
(*b*) *Leigh & Cave*, C. C. 225; 32 L. J. M. C., 53.

1864. is submitted that it is a robbery, for if the money was taken from *Peachey*, he being in possession of it, under a threat operating upon *Peachey* that *Keightley* would be shot, if he, *Peachey*, did not deliver it; that would be a robbery from *Peachey*. If, however, the same threat being conveyed to *Rotton*, he, under the influence of that threat, parted with his money to save *Keightley*; that would be a robbery from *Rotton*. Fear with respect to his family is sufficient, without actual violence, to make the offence robbery. Thus it is laid down in *Bracton*, lib. 2., cap. 5, in treating fo. 13 & 14, (*Quod donatio sit gratuita et non coacta; et quid sit metus*), who says, fo. 16, b., *Et non solum excusatur quis qui exceptionem habet, si sibi ipsi inferatur vis et metus; sed etiam si suis; ut si filio vel filiae, fratri vel sorori, vel aliis domesticis et propinquis; sicut de eodem Falcone, qui tenuit, in prona fratrem cuiusdam, donec frater ejusdem qui fuit extra prisonam dedit ei quoddam manerium* (a) and Lord *Hale* (b), lays down the law in the same way:—If thieves come to rob *A.*, and, finding little about him, enforce him by menace of death, to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery, yet he was not in conscience bound by such compelled oath, for the fear continued, though the oath bound him not, and in that case the indictment need not be special, for that evidence will maintain a general indictment of robbery, 44 E. III., 14. b.; 4 H. IV., 2. a.; Co. P. C., p. 68; Dalt., cap. 100, p. 257 b., who saith it was so adjudged, also in P. 36 *Eliz.* Mr. *East* (c), after citing the same case makes the following comment:—“not for the reason assigned by *Hawkins*, because the money was delivered while the party thought himself bound in consequence to give it by virtue of the oath which in his fear he was compelled to take, which manner of stating the case affords an inference that the fear had ceased at the time of the delivery, and that the owner then acted solely under the mistaken compulsion of his oath; but the true reason is given by

(a) Cited 2 East P. C. 218.

(c) 2 P. C. 714.

(b) P. C. 532.

Lord *Hale* and others, because the fear of that menace still continued upon him at the time he delivered the money, and therefore the indictment need not be more special than in ordinary cases." Constructive force is equivalent to actual force. If the owner delivered his money or were made to stand still whilst the thief took it up, that amounted, in construction of law, to a taking by force, because it was the effect of terror operating on the mind, which induced his acquiescence, and if the property were delivered, or suffered to be taken, by the owner, through terror impressed on his mind, and in order to get rid of that terror, it was a taking by force and amounted to robbery, *Donnally's Case* (a). There is no distinction between a personal violence to the party himself, and a case put by one of the Judges, of a man holding another's child over a river and threatening to throw it in unless he gave him money. The threat was to take *Keightley's* life unless £500 was obtained, the bushrangers were armed, and *Peachey* delivered the money when the fear of that threat was still operating upon his mind. In *Jackson's* case, there was no third person whose life was in danger, no demand upon a relative to pay his ransom. In this case, the pressure put upon *Rotton* was to part with this money to save the life of his son-in-law, who was still in custody, and this was a menace likely to influence a *constans vir*, and it still continued to operate when he parted with his money. [Stephen, C. J. But *Rotton* was not present at the robbery. Wise, J. Is money paid by a free agent, to prevent a crime being committed, recoverable by him in an action at law? It has been held in *Chowne v. Baylis* (b), that although the civil remedies, as against a felon, which belong to the person whose property has been feloniously taken, are suspended after the discovery of the commission of the offence, until the conviction of the felon, still the amount taken by the man who has committed the felony constitutes such a debt as may be made the consideration for the assignment of his property after the commission of the felony, but before the conviction of the felon, in order

(a) 2 East P. C. 718.

(b) 31 L. J. Ch. 757.

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to secure that debt to the person robbed.] At all events it is clearly larceny. It cannot be contended that the property in the notes passed to the bushrangers. *Peachey* had a right to go to the place where *Keightley* was, and the bushrangers had no right to appropriate the money. He referred to *Patch's* (a) case and *Pear's* case (b), and *Bishop* on Criminal Law (c).

STEPHEN, C. J. As to the point whether it is larceny or robbery, I am inclined to think that it was robbery or nothing. If *Peachey* threw down the money supposing that, if he did not do so, he would be shot, that would have been a reasonable apprehension under the circumstances. Actual terror need not exist, if circumstances exist which are sufficient to excite terror. He knew that if he did not give them the money, it was probable that they would have taken it, even if personal violence to himself had not been used. He was at the time in the custody of desperate and armed men who, in effect, demanded the money. He was *Rotton's* agent, and bailee of this money, and when he parted with the possession, no property passed to the bushrangers. I am clearly of opinion that it was larceny as against *Peachey*, and I have no doubt it was robbery. It could not have been robbery as against *Rotton*; but it was clearly larceny as against him—whose property it ultimately was that was taken. He intended to part with his money under a moral compulsion. *Bracton* says expressly that such is *donatio non gratuita sed coacta*. There was a delivery of the money for the sake of saving *Keightley's* life; but if there was such a delivery in consequence of fear being exercised, or fear prevailing, either with regard to himself, or his family, or even his neighbour, the property did not pass according to *Bracton*. Delivery by compulsion was no delivery at all. I do not say, that if A. went to B. and said, "I shall shoot your neighbour C. unless you give me £50," that would be sufficient to make it a robbery; but here the bushrangers had control over the person threatened, for he was in their custody.

(a) 1 *Leach* 238.(b) *Id.* 312.

(c) p. 971.

The possession of the money was also obtained by contrivance and a trick, and therefore the property in it did not pass. *Rotton* parted only with the possession, not with the property in this money. I am of opinion therefore that with regard to *Rotton*, it was larceny, and, without any doubt whatever, it was so with regard to *Peachey*.

WISE, J. I am satisfied that this conviction ought to be sustained. The only point deserving of argument arises from circumstances which can only be paralleled by going back to the dark ages of English history; and it would have been a grievous thing if we had been obliged to come to the conclusion that this was not a legal offence. I am of opinion that it was a robbery from *Peachey*. Robbery is the felonious taking of money or goods from their owner, against his will, by violence, and putting him in fear. Violence may consist of such circumstances as do not leave the party suffering the violence a free agent. It is not necessary that he should swear that he was afraid; actual fear need not be proved. In this case, after an ineffectual attempt to defend the house, *Peachey* finding *Keightley* in the custody of those cowardly men, consented to go and obtain from *Rotton* the money demanded by them as the ransom for *Keightley*. When he returned he was asked whether he had the money, and he said that he had, and he delivered it to them. I have no doubt it was robbery as against him; for if the bushrangers would commit the murder of *Keightley*, there was no reason why they should not kill *Peachey*, to prevent his ever being a witness against them. As to *Rotton*, I do not dissent from the judgment of the learned Chief Justice, but I do not give judgment on this point because I should have liked to consider it a little more. My only doubt is, whether a person can, at law, be considered to be justified in giving money to criminals, and abstaining for a whole day from giving information against the persons engaged in such unlawful courses.

Conviction sustained.

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June 8. In the matter of the mortgages of the ships "ALBION," "MYRTLE," and "GEORGE,"—and of sections 65 and 71 of the Merchant Shipping Act, of 1854 (a).

S. mortgages a ship to M. and afterwards to P.; both these mortgages were registered. M., under s. 71 of the Merchant Shipping Act, and before August 8, 1863, sells to C., before this conveyance is registered, P. applies to the Court and obtains a suspending order, under s. 65; and by his petition, asks for liberty to sell the ship under the power of sale vested in him as such mortgagee, under s. 71, upon paying M. the amount due to him. Held, that, assuming the Court had jurisdiction, the right of C. as against M. was an equity within the meaning of the third section of the 25 and 26 Vict., c. 63, and that therefore the Court ought not to interfere.

GORDON, for the petitioner, appeared in support of this application for an *interim* order under sect. 65 (b) of the Merchant Shipping Act of 1854.

The petition, which was supported by affidavit, stated that the petitioner Peacock was a second mortgagee of the three ships, Albion, Myrtle, and George; that on the 25th of April, 1864, Shoobert was the duly registered owner of these ships; that about August 8, 1863, Shoobert applied to the petitioner to advance, and that the latter had advanced £1000, secured by a mortgage of the ships; that the mortgage was in the form prescribed by the act; that at the time of the execution of this mortgage it appeared on the registry of the ships that they were then mortgaged to Murnin, to secure certain advances; that on April 22, 1864, the petitioner hearing that Murnin was about to dispose of the ships by private contract, under the power of sale vested in him as mortgagee, applied to Murnin to concur in a sale of the ships by public auction, or to forward to him an account of what was due to Murnin on his several mortgages, and offered to pay the amount which appeared so to be due; that in reply, Murnin stated that he had sold the ships to one Broughton for the amount of his mortgage; that the petitioner had searched the registry of C. as

(a) Before Stephen, C. J., and Wise, J.

(b) That section enacts that "it shall be lawful in England or Ireland for the Court of Chancery, in Scotland for the Court of Session, in any British possession for any Court possessing the principal civil jurisdiction within such possession, without prejudice to the exercise of any other power such Court may possess, upon the summary application of any interested person made either by petition or otherwise, and either *ex parte* or upon service of notice on any other person, as the Court may direct, to issue an order prohibiting for a time to be named in such order any dealing with such ship; and it shall be in the discretion of such Court to make or refuse any such order, and to annex thereto any terms or conditions it may think fit, and to discharge such order when granted with or without costs, and generally to act in the premises in such manner as the justice of the case requires."

of the ships, and discovered that no transfer of the ships or of any of them had been made ; that the petitioner believed that *Murnin* had agreed to sell to *Broughton* for the amount of his mortgage debt, and that he believed that *Broughton* was acting as an agent or trustee for the benefit of *Shoobert* ; that he believed the amount for which *Murnin* was about to sell the ships to *Broughton* was greatly below the value of the ships, and that double that amount would readily be obtained by a sale by public auction, or by private contract, and the petitioner was ready and willing to pay double the amount of the said price, deducting thereout the amounts due on the several mortgages ; that the petitioner desired, by sale of the ships under the power vested in him as second mortgagee, to obtain payment of the amount due to him by *Shoobert*, and that he was ready and willing before exercising the power of sale to pay off and discharge the mortgages of *Murnin*.

The prayer of the petition was, that the petitioner might be at liberty to sell the ships under the power of sale vested in him as such mortgagee, upon paying *Murnin* (which he offered to do) the amount due to him, and asked for an order prohibiting in the meantime any dealings with the ships.

Per Curiam. The order to be upon reading the petition and the affidavits, and to direct that the petition and order be served on the parties, on or before June 10th, and that all dealings with the ships be prohibited till June 22nd. The matter to stand over till June 16th, on which day the petitioner shall have leave to move for an order to enable him to sell the ships under sect. 71.

Gordon and Salamons, for the petitioner, moved that June 24th. (a) the Court would grant the order prayed for.

The Attorney-General, Darvall, Q.C., and Isaacs for *Broughton*.

(a) The case did not come on on June 22nd as *Wise, J.* was ill ; but was taken on the 24th, before *Stephen, C.J.* and *Milford, J.*

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Isaacs now read affidavits in reply. The affidavits contradicted the affidavits of the petitioner as to what occurred on the different occasions, and were to the effect that in April, *Murnin* offered to allow the petitioner to redeem, and told him so, but that then the petitioner said that he was unable to redeem. Thatafterwards *Broughton* had seen *Murnin*, and that, on April 10th, he agreed to purchase the ships for £1,446, one-third cash, and two-thirds by promissory notes, payable on May 28th, and June 6th; and that on April 11th the ships were transferred to him; and that it was agreed between these parties that the transfers should remain, unregistered, in the hands of trustees, as security, until the payment of the said promissory notes; and that, accordingly, on June 8th, when the last promissory note was honored, being the same day on which the interim order had been made, but before service of the said order upon him, and indeed without, as it appeared, any knowledge of the order, *Broughton* registered the several bills of sale. It also appeared that *Broughton* had now paid monies in and for this ship, over and above the mortgage.

Darvall, Q.C., for the respondent, claimed the right to begin.

Per Curiam. The petitioner must make out his case.

Gordon and *Salamons*, in support of the petition. The law does not recognise the validity of any transaction with respect to an interest in a ship, unless all the formalities prescribed by the statute are fulfilled; and the petition shows that, notwithstanding the agreement between *Murnin* and *Broughton*, there was nothing on the ships' registry at the time the petition was presented, and the interim order was made, except that *Shoobert* was owner, *Murnin* the first mortgagee, and the petitioner the second mortgagee; and the first mortgagee not concurring, the second mortgagee asks the Court, under sect. 71 (a), to allow him to exercise his

(a) Section 71 enacts that "every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is

power of sale, upon the terms of paying off the first mortgagee. *The Liverpool Borough Bank v. Turner* (a), is an express authority that everything required by the statute must be done, and that a Court of Equity will give no effect to an unregistered contract to assign a ship as a security for money due. Section 70, and form of transfer (k), shows that the mortgagor is still the owner, and that he sells subject to the rights of the mortgagees as they appear on the register; and section 71 enables the mortgagee to deal with it as absolute owner so far as regards the sale; but still subject to the same rights. The petitioner being second mortgagee is willing to give the same amount, that the rest of his security may not be altogether lost. The order takes effect from the time it is made and then the respondent's name was not on the register. No dealing with the property, *pendente lite*, can raise any new equities. *Edwards v. Regina* (b), was referred to.

The *Attorney General, Darvall, Q.C., and Isaacs*, contra. The order was inchoate and inoperative until service, and the respondent cannot be affected by it, until notice. But at all events he was entitled to register his security, and so complete his title. *Broughton* could not register the ships until he had paid and taken up the promissory note for the balance of the purchase money, which was due on June 6th, so that he registered on June 8th, which was the earliest practicable date. Registration was not necessary to complete *Broughton's* title. The sale was completed by the bill of sale, although till registered, his title was not secured. *Murnin*, as the first mortgagee had nothing to do with the second mortgagee. To make a transfer, the statute requires that there should be a registered owner; but it is not necessary that he who accepts a transfer should be registered; only such transfer is made subject to the inconvenience of being defeated by a subsequent registered, and to give effectual receipts for the purchase money; but if there are more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some Court capable of taking cognisance of such matters, sell such ship or share without the concurrence of every prior mortgagee."

(a) 29 L. J. Ch. 827.

(b) 9 Exch. 32.

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transferree who is first registered. The want of registration does not vitiate the sale, although it might give priority to a subsequent purchaser. Thus, it has been held, that, where a ship was mortgaged, but the mortgage not endorsed on the registry, another creditor, who had got judgment against the registered owner, could not seize the ship in execution. *Kitchen v. Irvine* (a). Such a defect does not prevent the ordinary incident of a mortgage,—that the mortgagee becomes the owner of the ship. Here *Broughton* bought the property, and a transfer was executed to him; he paid two-thirds of the purchase money, and in the meantime his title could not be registered; but supposing that he then had become insolvent, his interest surely would have passed to his assignee. [Stephen, C. J. But it is contended for the petitioner that the first mortgagee has no right to throw aside the subsequent mortgagees, being registered; and that if there be such mortgagees, the purchaser under the first mortgagee takes, subject to their right to redeem. If this be not the law, the first mortgagee could sell the ship for half its value, and thereby exclude the other mortgagees from getting anything from, or in respect of, the other half value.] If the petitioner had chosen to redeem when he was asked to do so, he would not have put *Broughton* into this difficulty; but now he ought not to be allowed to take the property from *Broughton* who takes under a transfer, which, it is contended, passes the property, although it is not registered. In the *Liverpool Borough Bank v. Turner*, which has been relied on by the petitioner, it was no transfer in any form prescribed by the statute, but a mere contract which required the Court of Equity to interfere to give it validity. But here all the forms prescribed by the statute have been complied with, except that it has not been registered. but the respondent also relies on the 25 and 26 Vict., c. 63, sect. 3 (b), by which it is "declared" that the

(a) 8 E. & B. 789; 28 L. J. Q. B. 46.

(b) This section is:—"It is hereby declared that the expression, 'beneficial interest,' whenever used in the second part of the principal Act, includes interests arising under contract and other equitable interests; and the intention of the said Act is, that without prejudice to

beneficial interest in the ship, including contracts to mortgage may be dealt with although there be no registration; and which is a statutory overruling of the *Liverpool Borough Bank v. Turner*. Under this section, if *Broughton* had only had a contract for the purchase, he would have been in a position to enforce that contract. It has been decided, under that section, that where a registered mortgagee of a ship deposited with a creditor the instrument of mortgage, such deposit constituted the creditor equitable mortgagee of the ship; *Lacon v. Liffen* (a). There is a great preponderance of evidence that *Peacock* knew of the intended sale to *Broughton*, and yet, he waits from April to June before he takes any step. The charge of fraud or collusion between *Murnin* and *Broughton* is altogether disproved. On what ground, then, can the second mortgagee, *Peacock*, be entitled, in reason or justice, to call on *Broughton* to surrender a good bargain, which, when offered to *Peacock*, he refused to make? If the property had been absolutely sacrificed at a price almost nominal, the case might have been different. *Peacock's* denial of any knowledge of the intended sale is not circumstantial or satisfactory. Mere inadequacy of price is not any ground for avoiding a contract, without there is also gross imposition or some undue influence (b). [Stephen, C. J. Suppose a sale at under value, but not collusively; and that before the day of sale the purchaser has notice of a second mortgage, can such purchaser retain his bargain?] The purchaser is under no obligation to give notice to anyone. Where is there an equity against *Broughton*? and will *Peacock* be allowed to redeem without reimbursing *Broughton* all his outlay on the ship?

Gordon, in reply. *Broughton*, being here, is completely under the jurisdiction of the Court. When he was ordered to appear here his contract was incomplete.

the provisions contained in the said Act for preventing notice of trusts from being entered in the register book, or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, &c., equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property."

(a) 32 L. J. Ch. 25.

(b) Story E. J. 244, 250.

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[*Stephen*, C. J. But the difficulty lies here, that if a subsequent mortgagee can interpose between the making of a contract for sale by the first mortgagee and its formal completion by registration, in a case like this, where no fraud or collusion is established, no such contract ever would be enforced or carried out where the second mortgagee should hear of it, except by the latter's consent]. The third section of the 25 and 26 Vict., c. 63, does not apply to this case. That section only affects a case between those whose names appear on the register, and third parties, who do not so appear; as for instance, in a case where a party might appear on the register as owner or mortgagee, it might now, under this section, be shown that such owner or mortgagee was trustee for third parties whose names did not appear on the register. But it is submitted that it does not affect parties whose legal rights are perfect *inter se*. Here for instance, *Murnin* might have been a trustee for third parties, and the new statute would have enabled such third parties to enforce their rights against *Murnin*, which could not have been done under the old statute; but the new statute does not have any operation with respect to equities prevailing against parties whose names are on the register *inter se*; with respect to such parties the Court will enforce their rights as they appear on the register. *Ward v. Becke* (a) was a case of this kind, and decides that the Court will take notice and give effect to the real intention of parties appearing on the register, and recognise their equitable interests. Therefore, although if *Murnin* were trustee for *Broughton*, the beneficial rights of the latter might be enforced against the former, it was never intended that they should be so enforced as to interfere with the rights of *Peacock* whose name is on the register. In *Lacon v. Liffen* (b), the question was as between a registered mortgagee and a third person, who had an equitable interest under a deposit, but whose name was not on the register; and there was no contest between the registered mortgagee and one whose

(a) 32 L. J. C. P. 113.

(b) 32 L. J. Ch. 25.

name was on the register, as in the present case. The title which is to oust any title on the register must itself be on the register; and a title on the register cannot be ousted by some equity to which that title is not liable. Why should an equity arising between *A.* and *B.* operate to the prejudice of *C.* who has a perfect title on the register? The register is the title as against all the world. *Broughton* takes the same but not more extensive rights than *Murnin*. What injury could be done to *Broughton* by *Peacock* being allowed to redeem, if it be really true that the ships are worth no more than what has been given for them and paid in respect of them. [Stephen, C. J. But why should we interfere? What has *Broughton* done that we should step in between him and his bargain, supposing that we have jurisdiction in this summary proceeding, which I do not think clear? Would it be just to do so? Milford, J. Under the sixty-fifth section has this Court jurisdiction? Is it capable of taking cognizance of such a matter? A Court of Admiralty or of Equity could sell a ship, but can this Court do so?]

STEPHEN, C. J. It is unnecessary to consider whether we have the jurisdiction, because I am of opinion that we ought not to exercise it, if we have it. The second mortgagee, *Peacock*, has failed to show why we should compel *Broughton* to surrender any advantages which he may have under his contract of purchase from *Murnin*. The *Liverpool Borough Bank v. Turner* is an authority that until a transfer is registered, it is only an inchoate transaction and not a complete transfer. If parties make a contract of loan on a ship, they are not safe until it is registered. However hard this may be, it is the law. I assume, therefore, that this bill of sale to *Broughton* not being registered is incomplete; and I also assume in *Peacock's* favor, that when the order was made it would take effect instantly, and that registration afterwards would have no effect. There was therefore nothing but a contract of sale between *Murnin* and *Broughton*; and if the recent Act, 25 and 26 Vic.,

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c. 63, had not been passed, *Broughton* would have had no answer, and possibly we should have interfered. As no bill of sale was registered, and there was no transfer, and as the subsequent mortgagee had come in and asked to redeem, although he could not absolutely claim it as a right, still the Court might have interfered; at all events the Court would have had the power to interfere. *Broughton* having no transfer, *Murnin* would have remained the owner, as the *Liverpool Borough Bank v. Turner* would have been, I think, an express authority that *Broughton* could not have enforced his title as the law then stood, because he had not fulfilled the formalities prescribed by the statute, and had not registered his bill of sale. But I am of opinion that the recent statute makes all the difference. I think equities are no longer excluded. The legislature says, the intention of the Shipping Act is without prejudice to certain powers conferred by that Act. Equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property—that is, that the owners and mortgagees of ships may have equities enforced against them just as if they were the owners and mortgagees of other personal property. *Broughton*, therefore, is entitled to say, "I am not to be shut out altogether; I am to be taken as having a contract; I have a bill of sale; I have paid the purchase money; I can explain why it is not registered; I am in such a position that I can call on *Murnin* under the statute to give me a good title; I can make *Murnin* give me a good bill of sale, and then I can register; the second mortgagee has nothing to do with me; whatever equities he may have as against the first mortgagee, the second mortgagee has none against me; if I have power under the statute to compel *Murnin* to fulfil his contract, I am the absolute owner; how can it be said that I am compellable to give up my bargain to the second mortgagee?" *Broughton* has made a bargain and wishes to keep it; what right has this Court to interfere? Even if *Broughton* could

not enforce his contract against *Murnin*, I am not quite clear that this Court ought to interfere. But as it is, I am of opinion that we ought not and cannot interfere. *Broughton* has done nothing wrong, or calculated to deceive *Peacock*. *Ward v. Becke* is simply a decision that a secret trust is not affected by the statute 17 and 18 Vic., c. 104, s. 66, and that the new statute, 25 and 26 Vic., c. 63, s. 3, has left things just where they were. The Court there agreed with the decision in the *Liverpool Borough Bank v. Turner*, in which case there was an incomplete transaction just like the present. If the law were not so, it would lead to enormous frauds. A first mortgagee in want of money might obtain it from *A.*, and the second mortgagee having notice of the loan would be able to step in and say "the money is paid; but as it is not registered I shall not allow you to enforce your contract." I am of opinion that the law makes registration obligatory; but it does not interfere with the right of persons under such circumstances as the present making themselves registered.

MILFORD, J. In the case of a mortgage of land, a second mortgagee has a right to redeem; but if the first mortgagee has entered into an agreement under a power of sale contained in his mortgage, a second mortgagee would have no further right to interfere with that sale; and the purchaser would hold the estate subject to such right to redeem. In the present case, *Peacock*, if there had been no sale by *Murnin*, had a right to redeem. But *Murnin* has sold to *Broughton*, and the question is whether that sale is a binding transaction? If it be, *Peacock* has no right to interfere; if it be not, things remain as they were. The statute of 1862 says, that equities may be enforced against mortgagees of ships in respect of their interest therein. *Murnin* is a mortgagee, and there is an equity against him; *Broughton* has such an equity because he has paid his money and got his contract of sale. He is entitled to enforce it against *Murnin* and compel him to complete the

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transaction. If *Peacock* were now let in, that transaction between *Murnin* and *Broughton* would be annihilated. Why should the Court interfere to destroy a binding contract between the first mortgagee and the purchaser from him? It is an equity and therefore I think that *Peacock* has no right to call for our interference; I may add that I have a very considerable doubt whether we have jurisdiction at all in such a case.

STEPHEN, C. J. The Court doubts whether it has jurisdiction, but, although it has no jurisdiction over the party against whom the application is made, it has jurisdiction to give costs against the party applying; and as we are of opinion that *Broughton* has a clear right to compel *Murnin* to carry out his contract, and that therefore this application must fail utterly, we must dismiss it with costs.

July 1.

Ex parte BURNELL and another.

Every application to bring land under the provisions of the Real Property Act must be confined to one block, or to a contiguous track, of land.

THIS was a motion under section 107 of the Real Property Act, to compel the Lands Titles Commissioners to entertain *Burnell's* application to bring certain property under the provisions of the Real Property Act (a). The summons after reciting that *H. C. Burnell* and *J. Blackstone* had applied to the Registrar General and the Lands Titles Commissioners, requiring that three properties, one in Pitt street, Sydney, one in Abercrombie-street, Redfern, and a third at Vaucluse, should be brought under the provisions of the Real Property Act; and that the title of the applicants thereto having been examined and reported upon by the Examiners of Titles, the application was referred to the Lands Titles Commissioners for their consideration whom made the following direction thereon, namely, "that the Lands Titles Commissioners decline to pass the titles of the three distinct properties embraced in the application, except a separate application is made for each, the reception of the appli-

(a) 26 Vic., No. 9.

cation in its present form being in direct contravention of a rule laid down by the board on the first June, 1863, to the following effect, viz:—1st. With regard to suburban and country land, that separate applications should be required for land situated in separate parishes or districts, except in the case of contiguous allotments or sections. 2nd. With regard to town lands not adjoining and having distinct roots of title, separate applications too are also to be required," and that the applicants were dissatisfied with the direction so given by the Commissioners upon the application, stated that at the request of the applicants the Registrar General was required to appear before the Supreme Court, &c., to substantiate and uphold the grounds of such direction so given, and to show cause why it should not be altered or annulled, and such application accepted and proceeded with, on the ground that the Commissioners had no authority to make any such rules.

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The Solicitor General for the Registrar General. The Commissioners are justified in declining to consider this application, which includes three separate blocks of land in distant, or, at all events, in different and separated localities, and which is in contravention of the rules framed by the Registrar General. If there can be ten or even fifty different blocks in as many different districts thrown into one application, there will be a loss of fees to the revenue by the process. For if only one application is necessary, there will be only one hearing and one certificate, or, at all events, only one will be insisted on. The Act contemplated the making of rules, although no express power may be given, for in section 97 the Registrar General is empowered to issue certificates, "as far as the same may be done consistently with any regulations at the time in force, respecting the parcels of land that may be included in one certificate of title." The statute contemplates the bringing under its provisions one block of land under one title; and although three blocks may belong to one proprietor, they are considered as three blocks. In support of this proposition he

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referred to sections 4, 14, 16, 97, and schedules A and P.

Sir *W. Manning*, Q.C., in support of the summons. The Registrar General had no power to make these rules and thus multiply the fees of the Commissioners. Any power of this kind affecting third persons, and not merely regulating the office must be expressly given. The Act admits of one application, including any number of titles and any number of different blocks of land. But it does not, therefore, follow that there must be only one certificate or only one hearing, because there may be only one application. The fee is for "hearing application," and it is obvious that the work of the Commissioners would be separate in reference to each separate title, and that there would be a distinct "hearing" on each title. But still the application might be one. The use of the singular noun in the different sections of the statute is immaterial, as by the sixth section of the Acts Shortening Act (a) the singular includes the plural.

STEPHEN, C.J. We need not decide as to the power of the Registrar General to make rules. But I am of opinion that, looking through the whole statute there must be a separate application for each block of land which may be ten thousand acres, or may be one acre, and not one application only for several blocks perhaps miles distant from each other. There may be inconvenience in having only one investigation as to a continuous track of land made up of united blocks where there is a variety of titles. But I think there would be a countervailing inconvenience in requiring separate certificates in such a case. It would, however, be very inconvenient and very unreasonable, that where there are fifty different blocks in fifty different districts, that they should all be included in one application; and convenience and reasonableness must be considered in construing a statute. It is plain from the whole language of the statute and from schedule A., that every application must be confined to

(a) 16 Vic., No. 1.

one block or contiguous track. I do not think that this argument is met by saying that under one application there may be several certificates. It might be very inconvenient that there should be fifty certificates for fifty separate blocks all included in one application. I do not agree with the Commissioners that the Legislature meant that any number of blocks within one parish or one district should be applied for in one application, but only in cases where various blocks have become united in one block. Although I doubt the powers of the Commissioners to make these rules, still as an expression of the law they are correct.

MILFORD, J. I am of the same opinion. Schedule A. would be sufficient to justify this conclusion unless there was something in some other part of the statute to indicate the contrary. The applicant is to declare that he is seized in fee in "all that piece of land," "which piece of land" is of a certain value; and this shows that the application was intended to be confined to one piece of land. A person can divide his land into as many portions as he pleases, and may make separate applications as to each. The Acts Shortening Act does not seem to me to apply to a schedule like this. I think also that the Commissioners have no power to make these rules. If they had such power, they might interfere with the schedule of fees, and even with the substance of the Act, so as to make it really inoperative. But this is not to be considered as a decision on this point as we have not called on the Solicitor General to reply.

Rule discharged, no order as to costs.

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June 9.

THE QUEEN *against* MORANDA.

An information charging that "M. being employed in carrying the mail between G. and M., and while so employed, did feloniously, steal a piece of paper enclosed in a letter sent by post," and not laying the property in either, in any one, is bad.

SPECIAL case reserved for the consideration of the Court, under 13 Vic., No. 3.

"The prisoner was charged and found guilty before me at the last Maitland Assizes, on the following information, namely, that he, on April 4, 1863, 'at Walhollow, being employed in conveying the mail between Gunnedah and Murrurundi, and while so employed, feloniously did steal a piece of paper enclosed in a letter sent by post.'

Entertaining some doubt whether this information discloses any offence under the forty-eighth section of the Postage Act, I reserved the question for the decision of the Court.

EDWARD WISE."

Supreme Court, Sydney,
April 29, 1864.

The *Solicitor General* on behalf of the Crown. The prisoner is charged with an offence against sec. 48 of the Postage Act (a), and it is not necessary to lay the property in any particular person; he referred to the case of *Hickman and Dyer* (b), where an indictment for stealing lead fixed to Brandon Church, was held good, which laid the property in the Vicar. But many of the Judges thought that the better way was to allege that it was "fixed to a certain building, being the parish church," without stating the property to be in any one.

(a) 15 Vic., No. 12. This section enacts "that if any person, whether employed in the Post Office or otherwise, shall fraudulently take from the possession of any postmaster or person employed to convey post letters, or from out of any Post Office or place appointed for the receipt or delivery of post letters, or shall steal or shall for any purpose embezzle, take, secrete, or destroy any letter or packet or mail of letters or newspaper or other printed paper, or any matter or thing enclosed in any such letter packet or mail, (sent or to be sent by such post), every such person so offending shall be guilty of felony."

(b) 2 East, P. C., 593.

No counsel appeared for the prisoner.

Cur. ad. vult.

STEPHEN, C. J., now delivered the judgment of the Court as follows:—

The question here is, upon a special case stated by Mr. Justice *Wise*, whether an information is good in law, which charges the prisoner (stated therein to be a person employed in the Post Office, with feloniously stealing “a piece of paper, enclosed in a letter sent by post”—not laying the property in either, in any one.

For the Crown, the Post Office Act, sect. 48, was relied upon, as by implication dispensing with any allegation of ownership. It is clear, however, that it always was necessary in larceny to lay the property stolen in some one. See *McGregor's* case (a), and Arch. Cr. Pl. title *Larceny* (b). If not, why were the various enactments, there cited, necessary? See also Com. Dig. Indictment G. 3, note *k*, and G. 5, note *b*. Also the case of *Johnson* (c).

The enactment relied on has, in our opinion, made no difference in this respect. The Act has already been, indeed, on this very point, more than once referred to by us as being defective. In the English statute, there is an express provision vesting the property in post letters in the Postmaster General.

The opinion of the Court being that the indictment is bad, the judgment thereon must be arrested, and the prisoner will be discharged.

Judgment arrested.

(a) 3 B. & P. 106.

(b) p. 281.

(c) 3 M. & S., 545, 549.

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June 9. The QUEEN against THOMAS KENNEDY and PATRICK KENNEDY (a).

Larceny of mare belonging to D. It was proved by the superintendent of H.'s run, that he believed that the mare was D.'s; that it had been eighty years on the run; that he never saw D., and that D. had never told him that she was his, but that his employer H. had told him so; that he knew it by the brands upon her; that all D.'s stock were so branded, and that he (the witness) had treated all with similar brands as D.'s; and that D.'s stock were kept on H.'s run for him. *Held, per Stephen, C. J., (Milford, J., dubitante, and Wise, J., dissentiente),* that there was not sufficient evidence of the property as laid; and the prisoner was recommended for a pardon.

SPECIAL case reserved for the consideration of the Judges, under the 13 Vic., No. 8.

"The prisoners were indicted before me at the last Maitland Assizes with stealing a mare and found guilty. The property in the mare was laid in *Charles Dangar*, and the only evidence in support of this allegation was given by a Mr. *Walker*, who deposed that he was the superintendent of Mr. *Hall*, and in charge of Mr. *Hall*'s cattle; that he believed that the mare was *Charles Dangar's*; that it had been in their charge for eight or nine years; and had ran five or six miles from the head creek; and that he had taken her out of the pound in August, 1861. On his cross-examination he said that he never saw *Charles Dangar*, and that he had never told him that the mare was his, but that his (the witness') employers had told him that she was *Charles Dangar's*; that he also knew it by the brand and the peculiar marks upon her. That all *Dangar's* stock was so branded, and he (the witness) had treated all with similar marks as *Dangar's*; that *Dangar's* stock were kept on *Hall's* run for him.

It was objected by the counsel for the prisoner that there was no evidence to go to the jury of the property being *Dangar's*, which I overruled; and at his request reserved this question for the consideration of the Court.

EDWARD WISE."

Supreme Court, Sydney,
April 29th, 1864.

Simpson for the prisoner.

The Solicitor General for the Crown.

STEPHEN, C. J. The question is, whether there was evidence to go to the jury of the ownership of the horse

(a) Before *Stephen, C.J.*, and *Milford, J.*

stolen, in one *Dangar*. It was proved by the superintendent on one *Hall's* run, that the horse was always "believed" to be *Dangar's*; that it had been eight years on the property; that it was dealt with as *Dangar's*, and bore a brand which many other horses on the same land bore; and which horses, as well as which brand, the witness "knew" from general repute and understanding, and from their being so dealt with on the property by *Hall* and his people as *Dangar's*. But there was no evidence by any one of having seen any of the horses branded, or of having ever seen *Dangar's* brand to know of his own knowledge whose brand it was; and no witness had ever seen any of the horses on *Dangar's* property or in his possession. I am of opinion that there is no sufficient evidence of ownership of this horse in *Dangar*. Mr. Justice *Wise* is not of the same opinion, as he thinks that there was evidence enough to go to the jury. The question depends on this point whether the cattle were ever branded by a person having authority to brand them for *Dangar*. Where cattle are proved to be branded by their owner in a particular way, it may be a question for the jury whether cattle similarly branded belong to that owner. If a witness proves that he is employed by *B.*, and that cattle have been given into his charge by *B.*, that would be evidence that such cattle were *B.*'s cattle. But here the witness does not prove that he is *Dangar's* superintendent, but *Hall's*; he says also that he has understood that this horse was *Dangar's*; and as against him that would be good evidence that it is *Dangar's*; but it is no evidence as against a stranger. The animal ought to have been charged in one count as *Hall's*, who was a bailee of the horse. The prisoner may be now indicted for stealing a horse, the property of *Hall*. But if on this second occasion the prisoner can prove that the horse really is *Dangar's*, he will succeed on the plea of *autrefois acquit*.

MILFORD, J. There is an assertion by the witness that he knew the horse; and that all stock so branded were *Dangar's*. If the evidence stopped here, it would have

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been an assertion that the witness knew legitimately that all stock so branded were *Dangar's*, and that this horse being so branded was *Dangar's*. That would be sufficient evidence to go to the jury, for them to decide whether it was *Dangar's* or not. But the evidence goes on to say that he had treated all cattle so branded as *Dangar's*. When one looks at the whole evidence, it is clear that the witness is not speaking of his own knowledge; but from belief or information which would not authorise the statement that all stock so branded were *Dangar's*; and therefore, I think, we must not consider his evidence as an assertion that all cattle so branded belonged to *Dangar*. I, therefore, entertain much doubt on the sufficiency of the evidence, and it being a criminal question, I agree with his Honor the Chief Justice, rather than with his Honor Mr. Justice Wise. If I am wrong, I think the prisoner ought to have the benefit of the grave doubt I entertain. One Judge thinking the conviction good; one thinking it bad; and the third Judge entertaining a grave doubt, the course which will be pursued, will be to recommend a pardon.

June 9.

The QUEEN against WILLIAM WILLCOX (a).

A shed without any door, having a bark roof and bushes at the sides and back and only forked sticks for posts, and to support the seat which was used as a privy by the occupant of an adjoining hut; there being no fence between it and the hut, is an outhouse within the 1 Vic., c. 89, s. 3.

SPECIAL case reserved for the opinion of the Judges, under 13 Vic., No. 8.

"The prisoner was convicted before me, at Darlinghurst, of maliciously setting fire to an outhouse of *John Batiste Morhan*. It appeared that *Morhan* had, without any license or authority from the Crown, erected a hut upon some waste lands of the Crown, near Emu Plains. About seventeen or eighteen yards from the house, the so called outhouse had been erected for a privy, in the following manner:—A paling stick was placed at each corner, the upper end of which was forked, and supported sheets of bark as a roof. The sides were composed of bushes; the seat rested on two sticks driven

(a) Before *Stephen*, C.J., and *Milford*, J.

into the ground. There was no door, but merely an entrance. There was no fence between the privy and the house, but a few of the original bushes remained. The prisoner occupied a hut near that in which the prosecutor lived. The prisoner was found guilty, but doubting whether the word 'outhouse' would include the premises above described, I reserved the question for the Court, whether upon the above facts the prisoner could be found guilty.

EDWARD WISE."

Supreme Court, Sydney,
May 9, 1864.

The *Attorney General* on behalf of the Crown. The building charged as being an outhouse, is of a most flimsy description, but still it is submitted that it is an outhouse within the decision in *Stallion's* case (a). In that case, which was an indictment under the 7 & 8 G. IV., c. 30, sect. 2, the building was formed by six upright posts nearly seven feet high; three in the front, and three at the back, one post being at each corner, and the other two in the middle of the front and back, these posts supporting the roof; there were pieces of wood laid from one side to the other. Straw was upon these pieces of wood, laid wide at the bottom and drawn up to a ridge at the top, the straw was packed as close as it could be packed; the pieces of wood and straw made the roof—and this building was held to be an outhouse. It is submitted that as this was used in connection with the house, although not within the curtilage, it is an outhouse within the present statute, 1 Vic., c. 89, sect. 3. The decision in *Amos Jones' case* (b), in 1844, which is under the existing statute, is to the same effect, and must be taken to overrule the decisions in *Parrot's case* (c) and *Haughton's case* (d), in both which cases, too, the prisoners were acquitted. *Winter's case* (e) was also referred to.

No counsel appeared for the prisoner.

(a) 1 Mood. C. C. 398.

(b) 2 Mood. C. C. 308.

(c) 6 C. & P. 402.

(d) 5 C. & P. 555.

(e) R. & R. 295.

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STEPHEN, C.J. The question is whether a shed of the most rough and temporary character, having a bark roof and bushes at the sides and back, but not any door, and only sticks for posts, and for the seat used as a privy by the occupant of an adjoining hut, there being also no fence between it and the hut—is an “outhouse” within the statute. I do not see how *Stallion’s* case, from which I cannot distinguish the present case, is to be got rid of, and the conviction must be sustained.

MILFORD, J., concurred.

Conviction sustained.

March 10, 16.
August 6.

BENNETT against FLOOD.

A person entrusted with the duty of delivering sheep at a place specified and to whom the animals are given over for that purpose, with the power of hiring servants under him, has a possession and sufficient property in the sheep to enable him to maintain trover as against a wrong dcer.

The plaintiff was employed to drive 6,000 sheep, belonging to A. & B., a distance of 150 miles, and paid a weekly salary, but was not responsible for losses on the journey. He had power to hire as many servants as should be necessary, at his discretion, during the journey, but at the expense of A. & B., and he was to procure provisions for the men, and for his horse, as they travelled. In the course of this journey about 1,500 of the sheep got astray in a scrub, near a station of the defendant, and the plaintiff being unable to discover them proceeded with the remainder to the end of his journey, and then ascertained the large number missing. The plaintiff thereupon went back, and found some hundreds of the sheep on the run of the defendant, which had been re-marked and clipped since the loss. The defendant claimed them as his own, relying, as he said, on his overseer’s knowledge of them. Some, however, were delivered up; and an action of trover was brought for the remainder. *Held*, (Stephen, C.J., *dubitante*) that the plaintiff could maintain the action.

Held, also that, in such action the measure of the damages should be the full value of all the sheep, when converted, subject to a reduction by the value of those returned when they were returned.

the sheep thither. Such at least was the understanding between the parties, for nothing definite appeared to have been settled as to the mode or amount of remuneration ; but this was the way, the plaintiff said, in which he had always previously been paid for his services. No arrangement was made, as to his being responsible for losses on the journey. He had power to hire assistants or servants under him, as many as should be thought necessary at his discretion, during the journey, but at the owners' expense. It would seem that he was, in like manner to provide provisions for the men, and for his horse, as they travelled. In the course of his journey, by some means not very clearly explained, above 1,500 of the sheep got astray, it was supposed, in a thick scrub, not far from a sheep run belonging to the defendant, under the actual charge of an overseer. The plaintiff rode back several miles in search of the animals, and made enquiries on the road about them in various directions ; but the extent of the loss, so he said, was not then known. He returned, accordingly, to the remainder of the flock with which he proceeded to Deniliquin, and there ascertained the large number missing. The plaintiff thereupon went back to the defendant's neighbourhood, and received information which led to the employment of the police, and the discovery of some hundreds of the sheep on the latter's run; these the defendant persisted in claiming as his own (they had all been re-marked and clipped since the loss) relying, as he declared, on the overseer's knowledge of them. Some of the animals, which the owners were enabled more clearly to identify, were delivered up, but the remainder the defendant refused, in effect, to restore—which, with the suggested and probable appropriation of many others, not discovered, was the conversion complained of.

Sir *W. Manning*, for the defendant, moved for a non-suit, on the ground, that the plaintiff was a mere servant, and had, in the legal sense, no sufficient possession of these animals, and, consequently, that the right of action for any sheep lost was only vested in the owners of the sheep, Messrs. *Brodrribb* and *Bennett*.

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The learned Judge expressed a decided opinion that the plaintiff was, at all events, no bailee of the chattels, and he thought also, that, as a mere servant, he could not maintain this action; nor had any reason been suggested why it was not brought by his employers in their own names. He refused, however, to direct a nonsuit, and left the case to the jury to find a verdict on the facts, and contingently to assess the damages, and he reserved the point for the decision of the full Court. The following questions were left to the jury, and their answers:—

First. Did the defendant, or anyone with his authority take the sheep? A. No.

Second. If they were taken without the defendant's authority, by others, did he eventually receive the sheep and deal with them as his own? A. Yes.

Third. Were the sheep astray, when taken? A. We find that the plaintiff's sheep had strayed from the main flock.

As to the damages, the jury found:—First, that the value of the sheep taken and not restored, with interest, was £359 13s. 4d. Second, that the value of six sheep killed, was £3 18s. Third, that the plaintiff's expenses seeking to recover sheep, was £68. Fourth, that the depreciation in value of the restored sheep, was £98 11s. Fifth, that the expenses of conveying the restored sheep to their destination, was £20.

The jury were asked, at the request of defendant's counsel, whether they were prepared to express an opinion, and if so, what was that opinion—upon the question whether or not the plaintiff had any guilty knowledge as to the taking of these sheep. They stated that they had not taken into consideration at all the question of moral guilt, and declined, therefore, to express an opinion upon this point.

The verdict was accordingly entered for the plaintiff, with damages £550 2s. 4d. subject to the points reserved.

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Sir W. Manning, Q.C., for the defendant, accordingly obtained a rule *nisi* to enter a non-suit or for a new trial, on the grounds—1. That on the points reserved and

on the evidence the plaintiff could not maintain trespass or trover. 2. That the verdict was against evidence, as far as the same relates to sheep other than those recovered by the plaintiff. 3. That the damage should be reduced as to the following items:—500 sheep, at 13s., £325; 6 sheep killed at 13s., £3 18s.; personal expenses and loss of time, £68; depreciation upon 1,314 sheep restored, at 1s. 6d., £98 11s.; expenses taking delivery of said sheep, £20 (a).

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Darvall, Q. C., and *Powell*, for the plaintiff, showed cause. This action will lie in the plaintiff's name who was the drover or servant employed by the owners of the sheep to drive them from one place to another place at a great distance. He got, or expected to get, so much a week for the driving of the sheep, employing servants at his own discretion but at the cost of the owners, and must be presumed to have been a skilled person. In *Milligan v. Wedge* (b), where a buyer of a bullock employed a licensed drover to drive it in London, and the latter employed a boy to drive the bullock; it was considered that the drover was not a mere servant, but rather a bailee, and the owners were not considered responsible for injury done by his careless driving. The master of a fly boat, who was hired by a canal company at weekly wages was held to be able to maintain trespass for cutting a rope fastened to the vessel, by which it was towed along the canal, although the vessel and the rope were the property of the company, *Moore v. Robinson* (c). It is also contended that the defendant being a wrong doer, cannot dispute the possessor's title. A person possessed of goods has a good title as against every stranger, and any one who takes them from him, having no title in himself, is a wrong doer, and cannot defend himself by showing that there is a title in some third person, for against a wrong doer like this defendant, possession is a sufficient title, *Jeffries v. Great Western R. Co.* (d), *Wilbraham v. Snow* (e). In a case where

(a) As to the second and third grounds, see *post*, p. 169.

(b) 12 A. & E. 740.

(c) 2 B. & Ad. 817.

(d) 5 E. & B. 805; 25 L. J. Q. B. 107. (e) 2 Wms. Saund. 47 f.

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the plaintiff bought a vessel which was stranded, but she was not conveyed to him according to the provisions of the Register Acts ; the plaintiff took possession of her and tried to save her ; but she went to pieces and parts of the wreck drifted upon the defendant's premises, and were by him cut up and carted away ; and it was held that there was enough property in the plaintiff to enable him to maintain trover, *Sutton v. Buck* (a) ; and in his judgment, *Laurence*, J., says, "Though this contract is void with respect to the rights of third parties, yet, as regards the possession, it is good as against all except the vendor himself." The same principle has been applied in criminal law. In an indictment for larceny, where the goods had been stolen from the boot of a coach while on the road, the property in the goods was held to be rightly laid in the mere driver, although he was not liable for things stolen, on the ground that, although as against his employers he had only a bare charge of the goods, and not the legal possession which remained in his masters, yet as against the rest of the world he had such a special property in them by his possession of and control over them that he must be considered as the possessor; *Deakin's case* (b). And it is for this reason that, where the original taking is a trespass, although no felonious intention then exists, a subsequent misappropriation is held to be larceny ; *R. v. Riley* (c.). There is no difference whether the plaintiff was the drover or the servant only ; for a recovery by the bailee would be a bar to an action by the owner. In *Nichols v. Bastard* (d), *Parke*, B., says, "either the bailor or bailee may sue, and whichever first obtains damages, it is full satisfaction." *Reg. v. Newman* (e) and *Wilkin's case* (f) were referred to. [Stephen, C.J. In *Fyson v. Chambers* (g), *Parke*, B., says, "whether a mere naked possession entitled a party to maintain trover, even against a wrong doer, is one upon which I entertain considerable doubt, and which has yet to be

(a) 2 *Taunt.* 309.(b) 2 *Leach* 862, 876.(c) 22 *L. J. M. C.* 48.(d) 2 *C. M. & R.* 659.(e) 1 *Sup. Ct. R. C. L.* 345.(f) 1 *Leach* 523.(g) 9 *M. & W.* 467.

determined."] *Buckley v. Grose* (a) was referred to (b).

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Sir *W. Manning*, Q. C., and *Butler*, contra. The present plaintiff cannot maintain this action; for he was not a drover having an independent possession of the sheep as in the case of *Milligan v. Wedge*, but was merely a servant of the owners and the possession was theirs in legal contemplation; he was not responsible for losses except for negligent or other misconduct, and drove no animals except these sheep on their journey. In *Hey's* case (c), the fact, that the prisoner was at liberty to drive the cattle of any other person at the same time, was held to raise an inference that he was not a servant. [*Wise*, J. Must not the circumstances of the colony, and the mode in which cattle and flocks are driven overland be taken into consideration?] Although the plaintiff may have had a right to continue in charge till he got to Hay, yet he was only a servant throughout. The Judge was never asked to put to the jury the question whether the plaintiff was a drover or not? therefore this omission cannot be complained of. But it was no question for the jury—what conflict was there on that point? It is immaterial to consider any previous employment of the plaintiff. The terms of the agreement and the nature of the contract show that he was a servant as a matter of law. In *White v. Bailey* (d), the plaintiff, a bookseller, was employed by a society established for the sale and publication of certain works, as their storekeeper and agent, originally upon the terms that he should have the premises, rent and tax free, in a good situation, 35 per cent. on all sales in the shop, that he might sell other works

(a) 32 L. J. Q. B. 129.

(b) In *Routh v. Wilson** it appeared that A. sent his horse, for the night, to B., who turned it out after dark into his pasture field, adjoining to and separated from a field of C. by a fence which C. was bound to repair; the horse, from the bad state of the fence, fell from one field into the other, and was killed. It was held that B., though a gratuitous bailee, might maintain an action against C., and recover the value of the horse. See also 2 Kent's Comm. 789.

(c) 1 Den. C. C. 602.

* 1 B. & A. 59.

(d) 30 L. J. C. P. 253.

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of a religious character for his own benefit, and that the committee should guarantee him £150 for the first year. The appointment was from year to year, by resolution of the committee, and on successive re-appointments of the plaintiff the terms of the resolution were somewhat varied, those of the last re-appointment being that he should be manager, for the ensuing year, at a salary of £75 a year, and six months' notice of separation on either side. The society occupied a house, the lease of which was vested in trustees for them, and they paid the rent and all out-goings. The upper rooms were inhabited by the plaintiff, over the door was the name of the Society, and on the panels, the plaintiff's name with the addition of "bookseller and publisher." In consequence of disputes, plaintiff was dismissed, possession taken of the premises, and plaintiff turned out. In an action of trespass brought thereupon, the plaintiff was non-suited on the ground that the plaintiff's occupation of the premises was that of a servant; *Mayhew v. Shuttle* (a), was decided on a similar ground. A salaried officer of an unincorporated partnership, who was also a shareholder, has been held to be a servant, *R. v. Watts* (b), *Remnant's* case (c). A caretaker of a chapel has no special property in the furniture therein, although also in his charge, and he alone kept the keys; *R. v. Hutchinson* (d). In *McNamee's* case (e), it was expressly decided that a man hired to drive cattle, has the custody only, and not the possession of the cattle. [*Stephen, C.J.*, referred to *Heydon and Smith's* case (f), where it is laid down, that a servant commanded to carry goods to a certain place, might maintain trespass, see also, *Ascomb v. Hundred of Spilholm* (g).] It is submitted that the plaintiff had only a custody or charge, as a butler has of his master's plate, or a groom of his master's horse; *Reed's* case (h). Where a warehouseman employed a master-porter to remove a barrel from his

(a) 4 E. & B. 347; 23 L. J. Q. B. 372.

(b) 19 L. J. M. C. 192.

(c) Russ. & R. 137.

(d) Russ. & R. 412. 2 East P. C. 568.

(e) R. & M. 368, but see *Hey's* case, 1 Den. C. C. 605.

(f) 13 Rep. 69. (g) 2 Salk. 613. (h) 23 L. J. M. C. 28.

warehouse, who employed his own tackle and men—the latter was held to be a mere servant; *Randleson v. Murray* (a).

There was no "taking" by the defendant of the sheep, but, at most, a finding of them, when they were astray, by a third party, and a receipt of them by the defendant from such finder; and, at the time of the finding, the plaintiff had been out of possession for some days, and not merely while looking after them; for he had been to the end of his journey before the sheep were missed by him. This is no state of facts to support an action of trespass, for there was no taking, actual or constructive; and this plaintiff and his possession cannot maintain trover. The distinction between the taking sheep and merely appropriating them when found, is very material. In *Jeffries v. Great Western R. Co.*, and the other cases cited, where as in *Matson v. Cook* (b), wrong doers have not been allowed to question the plaintiff's possession, the act complained of has been a direct act of trespass. If a thief, or other mere wrong doer, actually take goods from another's possession, he may be guilty of a trespass as against the latter, but the true owner only can maintain trover to recover property, or its value, from the wrong doer. Here the plaintiff's contract was at an end and his mission was completed; he had got to Hay, the terminus, and he only returned back to search for the missing sheep. And can it be said that he remained a drover and bailee the whole of that time? If the defendant found the sheep, or only received them from the finder, he has right to retain them against all but the true owner; *Bridges v. Hawkesworth* (c).

Even if the plaintiff was entitled to the custody, yet he might not be able to maintain trover; *Addison v. Round* (d). Here the finder of these sheep had an independent title of his own, and the plaintiff had lost his right as against the finder, even if the plaintiff had previously a bailment. But the bailment was determined by completing the journey to Hay. Even if the defendant had

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(a) 8 A. & E. 102.
(c) 21 L. J. Q. B. 75.

(b) 4 B. N. C. 392.
(d) 4 A. & E. 802.

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no title in himself, he might in an action of trover under the plea of not possessed, set up the *jus tertii*, that is the title of *Brodrribb* and *Bennett* the true owners; *Leake v. Loveday* (a). For the defendant had, at all events, some right as finder of the animals, nor could they be taken lawfully from the defendant's land by any one except the trueowners; but not even by them, unless the defendant took the sheep; *Patrick v. Colerick* (b). [Wise, J., referred to *Wilkin's* case (c).]

Cur. ad rult.

August 6.

The judgment of the Court was now delivered by STEPHEN, C.J. This is an action of trover for sheep, the property of the plaintiff's employers, in which a verdict has been found for him to the amount of the value of the animals, and the question reserved for our consideration is, on a motion by the defendant for a new trial, whether that verdict can in point of law be sustained—it being contended that this action will only lie at the suit of the actual owner, or a bailee of the chattels, which, it was insisted, the plaintiff was not.

The sheep in question, with a large number of others, in the whole amounting to nearly six thousand, were purchased by two gentlemen, on the Lachlan River, for transmission thence to Deniliquin, a distance of about 150 miles. The plaintiff, who had occasionally been employed similarly by one of these gentlemen, who was in fact his brother, was hired at a weekly salary to drive the sheep thither, such, at least, was the understanding between the parties; for nothing definite appears to have been settled as to the mode or amount of remuneration—but this was the way, the plaintiff said, in which he had always previously been paid for his services. No arrangement was made as to his being responsible for losses on the journey; but the plaintiff was liable by law, of course, for negligence and want of ordinary skill and care. He had power to hire assistants or servants under him, as many

(a) 4 M. & G. 972, 986.

(b) 3 M. & W. 483. See *Blades v. Higgs*, 30 L. J. C. P. 347.

(c) 1 Leach 522.

as should be thought necessary, at his discretion, during the journey, but at the owners' expense. It would seem that he was in like manner to procure provisions for the men, and for his horse, as they travelled.

In the course of this journey by some means not very clearly explained, above 1,500 of the sheep got astray—it was supposed, in a thick scrub, not far from a sheep run belonging to the defendant, under the actual charge of an overseer. The plaintiff rode back several miles in search of the animals, and made enquiries on the road about them in various directions; but the extent of the loss, so he said, was not then known. He returned, accordingly, to the remainder of the flock, with which he proceeded to Deniliquin, and there ascertained the large number missing. The plaintiff thereupon went to the defendant's neighbourhood, and received information which led to the employment of the police, and the discovery of some hundreds of the sheep on the latter's run. These the defendant persisted in claiming as his own, (they had all been re-marked and clipped since the loss), relying, as he declared on the overseer's knowledge of them. Some of the animals, which the owners were enabled more clearly to identify, were delivered up; but the remainder the defendant refused, in effect, to restore, which, with the suggested and probable appropriation of many others, not discovered, was the conversion complained of.

On a motion at the trial for a nonsuit, on the ground recently renewed, I expressed a decided opinion that the plaintiff was, at all events, no bailee of the chattels; and, I thought also, that, as a mere servant, he could not maintain this action—nor was any reason suggested why it was not brought by his employers in their own names. I refused, however, to grant a nonsuit, and reserved the point for decision in banc.

The ground of that expressed opinion was not, of course, any doubt as to the right of a person, having in fact and in legal contemplation the possession of goods, to maintain trover for them; but whether the plaintiff here had, in the legal sense, possession of these animals. It

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struck me that he had the bare *charge*, not possession—and therefore no property in them. A shepherd has not more than the custody, he has not possession of his master's sheep. And to support trover, although a special property is sufficient, property is essential; *3 Co. Inst.* 108; *Hutchinson's case* (a), *Webb v. Fox* (b), *Wilkin's case* (c), and other authorities. A carrier or a drover (that is to say a person carrying on that business), is in an independent position, and has undoubtedly the possession of, and a special property in, whatever goods may be entrusted to him in that capacity. But that the owner's servant, casually employed, as here, has such a property in his employer's goods—so that he can in his own name and right sue for and recover their value, and thereby change the property in them—which is the legal result of a verdict and judgment for the plaintiff in trover—appeared to me by no means to follow.

My learned colleagues, however, are both of opinion that a person entrusted, as this plaintiff was, with the duty of delivering sheep at a place specified, and to whom the animals were given over for that purpose, with the power of hiring servants under him, had a possession, and therefore a sufficient property in those sheep, to enable him as against a mere wrong doer to maintain this action.

Although not cordially concurring in this conclusion of my colleagues, I scarcely feel justified in saying that I dissent from it; for I confess myself unable to distinguish the present case from that of *Hayden v. Smith* (d), where a servant had been conveying goods—cited in *Rex v. Deakin* (e). The case in the Year Book of 2 Edw. IV., cited in p. 872, was that also of a servant (not being a house or domestic servant) employed to carry goods to a certain place; and, the goods having been taken from him during the transit, it was held that he might maintain trespass against the wrong doer. But if a person employed to drive sheep, to a distant station,

(a) R. & R. 412; 2 East's P. C. 652.

(c) 1 Leach 520.

(b) 7 T. R. 398.

(d) 13 Co. Rep. 69.

(e) 2 Leach 873.

as this plaintiff was, and having the entire control over them for that purpose, has a special property in them at all, he must, in my opinion retain it in a case like the present, until his mission shall have been accomplished. The ownership would not be determined merely by going fruitlessly to the appointed place, in respect of any animals, accidentally, or without intention of his own, left behind him. The special property, I concede, which will suffice to sustain an action of trespass, will equally support trover for the same goods; see *Jeffries v. Great Western Railway* (a).

The judgment of the Court, therefore, in the point urged (others yet remain for discussion), will be for the plaintiff.

Mr. Justice Wise desires to add, that in his opinion the decisions in cases of larceny, or fraud, do not apply to a question like the present. For a servant entrusted with goods may, as against his master, have the bare charge of them—and yet have possession, against a mere wrong doer. The distinctions which have been held to exist, in the criminal law, between charge and possession, and, in some cases, between possession and property, are occasionally refined and subtle, and cannot, he thinks, determine the right of parties in a civil action.

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Darvall, Q. C., and Powell, now showed cause against the rule *nisi* granted on the second and third grounds for the reduction of damages (b). If the defendant received and claimed 1,300 out of the 1,800 sheep which were all lost in one locality, and at the same time, there is equal reason to conclude that the whole 1,800 were received by him; as a sufficient number answering the description of plaintiff's sheep were found in the defendant's possession to raise a presumption that the rest were in his possession also; especially as it is the nature of sheep to move together in flocks. The jury have found, in fact, as they were entitled to do on this circumstantial evidence, that the defendant received every missing sheep

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(a) 5 E. & B. 806, 807.

(b) See *ante* p. 161.

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into his possession, and there is every reason to believe that their conclusion is correct, and why should the Court interfere with their conclusion? It is not necessary to identify each sheep. The jury need not have absolute proof of the ownership of the property; for, if that were required, where sheep are not branded, they would be able to be taken with impunity.

As to the different items of the special damage they were all the natural, if not the necessary, result of the defendant's wrongful act. *Bodley v. Reynolds* (a) shows that in trover special damages may be given, besides the value of the goods converted, if it is claimed in the declaration. There a carpenter, whose tools had been converted, recovered damages for the hindrance suffered in his work for want of his tools. The plaintiff is entitled to recover the full value of the sheep as against the defendant who is altogether a wrong doer; *Turner v. Hardcastle* (b), *Collins v. Wright* (c), *Dixon v. Fawcett* (d), and *Burton's case* (e) were referred to.

Sir *W. Manning, Q. C.*, and *Butler*, contra. This was a case not of taking but (if anything) of finding sheep, but, perhaps, at different times. There is no evidence whatever where the plaintiff lost them; so that although 1,300 came to the defendant's hands, the other 500 may not have done so. It is remarkable, however, that the plaintiff in his declaration did not proceed for the value of the 500, but only for injuries done to the 1,300 and for the plaintiff's expenses in looking for them.

It is submitted that the expenses were consequent on the plaintiff's own act of losing the sheep, and not on the defendant's receipt or detention of them, and cannot be recovered because the plaintiff must have incurred them, and gone to look for the sheep. The defendant was entitled, if he was not bound, to keep the sheep until the owner appeared. The plaintiff's personal expenses in going back for the sheep which he, by his

(a) 8 Q. B. 779.

(c) 27 L. J. Q. B. 215.

(b) 31 L. J. C. P. 193.

(d) 30 L. J. Q. B. 137.

(e) 23 L. J. M. C. 55.

negligence had lost, cannot be recovered, nor the value of four out of the six sheep at all events, for the defendant had nothing to do with the killing of the former (a). His expenses cannot be considered the natural or direct consequence of the defendant's act, and were not shown to have been incurred since the conversion, but they were incurred in consequence of the loss of the sheep by the plaintiff's own neglect. And lastly the depreciation in the value of the sheep is not recoverable; for the "depreciation" for which the jury have assessed damages by their verdict, is not aimed at at all or included in the declaration. It was not shown to be posterior to the conversion, and therefore it was a specific independent wrong, if any. [Stephen, C. J. The plaintiff is entitled to the sheep when they are lost. Suppose that A. loses a gun which B. finds, and while it is in B.'s possession its lock is injured. In an action of trover brought against B., A. would be entitled to recover the value of the gun when he lost it.] It is submitted that the defendant is only liable for the value of the sheep at the time he asserted ownership over them and that was after they were depreciated.

STEPHEN, C. J. As to the 500 sheep, I am of opinion that there was sufficient evidence before the jury upon which they were entitled to find, as they evidently intended to do, that the whole of the 1,800 sheep got into the defendant's possession and were detained by him after he had knowledge of the plaintiff's title to them; and there was, in addition to this, the possibility that, as 1,300 of the missing sheep certainly came into the defendant's hands, the other 500 did so also. The evidence was conflicting, and it was for the jury to consider which witnesses they would believe, and we cannot interfere with their decision. As to four out of the six sheep we think the plaintiff cannot recover, because the killing them was the act of the Justices. As to the personal

(a) The evidence on this point was, that at the enquiry before the Police Office, the sheep were there, and that six were drafted out and killed; and their skins were taken to the Quarter Sessions to be used as evidence; of these six two were killed by desire of the defendant's attorney, and four by order of the Bench.

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expenses and loss of time, we think that the plaintiff cannot recover, under the circumstances of this case, as the sheep were astray and lost possibly through his negligence.

As to the depreciation of the 1,314 sheep, at 1s. 6d. a head, it is said that this special damage is not asked in the declaration. We are of opinion that as this was an action in trover for the whole number of sheep, the plaintiff was entitled to obtain the market value of such sheep; but he was bound to give the defendant credit for the value of the sheep when they were restored to him. This principle is laid down in *Brierley v. Kendall* (a), and *Turner v. Hardcastle* (b). As the defendant is a mere wrong doer, he is liable to the plaintiff for the full value of the sheep. The result is that we direct the verdict to be reduced to £459 10s. 4d. As the defendant has succeeded in reducing the damages by £90 12s., we think that, as to this latter argument on which we now decide, each party ought to pay his own costs. The plaintiff will get his costs of the former portion of the argument, upon the motion for a new trial.

MILFORD, J., and WISE, J., concurred.

Judgment accordingly.

(a) 17 Q. B. 296; 21 L. J. Q. B. 161.

(b) 11 C. B. N. S., 683; 31 L. J. C. P. 193.

Ex parte BERGIN.

July 1.

ISAACS, on behalf of *Bergin and Co.*, creditors of one *Pearson*, moved on notice to set aside a deed of settlement of two allotments of land, at Burwood, made by *Pearson*, within twelve months before his sequestration, upon his wife, without valuable consideration—he being indebted to *Bergin and Co.*, and other creditors.

It appeared that the deed of settlement was dated October 26, 1863, and that *Pearson* sequestered his estate on May 6, 1864.

Darley showed cause and objected that the proceedings were irregular. The application should have been by rule *nisi*, or by summons signed by a Judge, and not by a mere notice of motion signed by an attorney, which can only be in some pending suit.

Per Curiam. The proceeding is to be “on a summary application to and by order of the Supreme Court,” (a) and this includes a motion on notice.

Darley then contended that the seventh section of the Insolvent Act did not include land. The word “estate,” which is used in ss. 8 and 9, has been omitted in sect. 7. The legislature intended that in cases of real estate parties should be left to their remedy in a Court of Equity, when that Court would give to the wife a right to a provision out of her own property, as against the husband’s assignees; *Murray v. Elibank* (b). The words, “goods or effects, real or personal,” may apply to leaseholds; but not to freeholds out of which a Court of Equity will direct a settlement. He referred to *Buchanan v. Harrison* (c), *Rawlings v. Jennings* (d), *Wrench v. Jutting* (e), and *Jarman on Wills* (f), Ch. 23.

(a) 5 Vic. No. 17, s. 7.
(c) 31 L. J. Ch. 74.
(e) 3 Beav. 521.

(b) 1 Wh. & T. L. C. 362.
(d) 13 Ves. 39.
(f) I Vol. 644.

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Isaacs for the creditor. The word "real" must have some effect given to it. The Court has made the order now asked for in similar cases before, as in *Belcher's Estate*, in which the order is dated Sept 7, 1860; although in that case the transferee did not appear to show cause, and the point therefore was not taken.

STEPHEN, C. J. The dry legal question is whether this deed can be set aside under the seventh section. It has been argued that the words "effects real," refer only to chattels real. Although I have some misgivings, yet, on the whole, I yield to the opinion of my brother, Mr. Justice Milford, and think that these words include land. There can be no doubt that this construction carries out the intention of the legislature. We order, therefore, that the deed be set aside as against this creditor to the extent of his then existing debt, and direct that the property be sold by the registrar, subject to any mortgage upon it; that the amount of such debt he paid to the official assignee, and that such debt and the cost of this application be paid to *Bergin and Co.*; and that the balance, if any, be retained in the hands of the registrar, to abide the further order of the Court (a).

(a) *In the Insolvent Estate of McGrath.*—May, 1858.—Ex parte *Coghlan*.—This was a motion to set aside a voluntary conveyance by the insolvent settling property on his daughter. The property was sworn to be worth more than the creditors' debt.

Per Curiam. We have no jurisdiction to set aside the deed absolutely, but only in so far as the creditor shall be deprived by the deed of the means of recovering his debt. It only remains, therefore, to consider in what way the intentions of the legislature, which are clear, shall be carried out. In the terms used in the enactment this would be impossible. We therefore order that the property shall be sold by the assignee, and that the trustee who appears and submits to the Court shall join in the conveyance; and that the surplus proceeds, if any, above the debt and the expenses of the sale, shall be paid over to the latter as the party entitled thereto. We do not think that we have power to make any order as to the costs of this motion. But *Therry*, J., thinks that we may make such order, as incidental to the statutory authority conferred on us to give the creditor "the full amount of his debt."

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WYSE *against* HEGGARTY.

June 17.

APPEAL from the District Court of Albury.

"This is a case tried before the Judge of the District Court of Albury, and a jury, on the 24th day of March, 1864, in which a verdict was given for the defendant, and the plaintiff, being dissatisfied with the determination of the Court, in point of law, now appeals.

The facts proved in evidence are as follow:—

The plaintiff and defendant, in August, 1862, verbally, agreed to purchase a piece of land and work it together in partnership, the terms of which were put into writing by the plaintiff (a), but it was neither signed nor dated. The land was worked and farming implements and stores, and rations, were supplied on the terms of the agreement, for eighteen months, when plaintiff and defendant quarrelled. Up to this time plaintiff had received nothing of any kind from the partnership, and it was not disputed that the goods were supplied by the plaintiff, and the prices were reasonable; also, that the money had been

The plaintiff and defendant having entered into a partnership; the plaintiff, pending the partnership, sued the defendant in the District Court, for goods sold and delivered, money lent, money paid, and on accounts stated. *Held*, that it was a question for the jury whether the items had been supplied on the defendant's individual, or on the partnership, account; and that in the former case only could the

plaintiff recover in that action.

Held also, that under that plaint the plaintiff could not recover any unliquidated balance of a partnership account under the eighth section of the District Courts Act.

Held also, that to entitle a plaintiff to recover under the eighth section the plaint must be specially framed.

Held also, (per *Wyse*, J.), than an amendment of the plaint so as to raise the question under the eighth section, was not within the scope of the amendment clauses of the statute.

Quere, whether, if so framed, the plaintiff can recover pending the partnership.

(a) The following are the only terms of the agreement which it is necessary to specify:— "It is agreed between the abovenamed parties to purchase by free-selection 320 acres of land, near Howlong, on the Murray River, in the colony of New South Wales, as co-proprietors, and to cultivate and improve the same for the term of five years from the above date, each party to pay an equal share of the purchase money. The said James Wyse agrees to advance all moneys required for the working of the place until the first crop of grain is stored off of the said land, also to supply all rations, tools, &c., for the said term, after that time each party to pay an equal share of the expense. James Wyse further agrees to supply all horses, drays, &c., for the term of five years from the above date. At the expiration of five years the said Samuel Heggarty agrees to pay unto the said James Wyse, his heirs, successors, or assigns, the half of the expenses incurred between the time of the selection of the land and the reaping of the first crop, the produce to be sold, and the proceeds to be equally divided between the abovenamed parties within one month after the sale of any part thereof."

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paid by plaintiff, but the plaintiff swore that the goods and money were supplied and paid for defendant's private account, and had nothing to do with the partnership, while the defendant swore that the goods and money were supplied and paid for the partnership account, whereupon plaintiff sought to have a settlement of accounts, but defendant refused to render any account, when plaintiff brought the present action, in which the following were the plaint and particulars of demand :—

The plaintiff sues the defendant for that the defendant is indebted to the plaintiff in the sum of £129 for money lent ; then follow the common counts, for money lent, money paid, money had and received, on account stated, and for goods sold and delivered. A long bill of particulars is added of seventy-five items (like those in an ordinary store account), from 9th October, 1862, to 26th June, 1863. Seven of these items, namely :—

9 October, 1862.—Cash	-	-	-	£25	0	0
February, 1863.—1 ton flour	-	-	-	20	0	0
31 May	„	—1 saddle and bridle		4	0	0
21 June	„	—Cash to <i>Drew</i>	-	4	16	1
25 „	„	—Cash to <i>O'Hara</i>	-	20	0	0
„ „	„	—Cash	-	10	0	0
„ „	„	—Two mares to horse		3	10	0

were marked as hereinafter mentioned.

The Judge told the jury that in his opinion the partnership was still subsisting, and that no action could be brought for an unliquidated balance of account for items supplied within the terms of the agreement, so long as such partnership was in existence. That if they thought the agreement was, in fact, that set out in the memorandum, then that he advised them to withdraw from their consideration all the articles in the particulars except the seven articles that were marked.

The following are the grounds of appeal :—

1. That the Judge's direction was contrary to law.
2. That the whole or part of the unliquidated balance of a partnership account can be sued for and recovered in the District Court, notwithstanding the continuance of

the partnership under the eighth section of the District Court Act.

3. That the Judge should have left it to the jury to say whether all the goods were within the terms of the agreement as a matter of fact.

4. That there was in fact no agreement binding in law because it was not in writing and signed by the parties to be charged.

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Innes, for the appellant. There was a misdirection in withdrawing from the jury the question as to the goods other than the seven items. Secondly, the statute gives a jurisdiction to entertain questions of partnership accounts pending the partnership. A Court of Equity will decree an account of past partnership transactions, although the bill does not pray for a dissolution; *Richards v. Davies* (a), *Richardson v. Hastings* (b). He referred to *Durant v. Tomlins* (c), and *Foster's* District Court Act (d).

Salamons, for the respondent. The words "unliquidated balance of partnership accounts" show that the action will only lie *after* the dissolution, because there cannot be an *account* till such dissolution. The words "whole or part" show that if such balance is not more than £200, the "whole" can be recovered in the District Court; but, if the balance is more than that amount, the excess must be relinquished to give the jurisdiction, and then only "part" is recovered. The effect of the 8th section is, that, whereas in a court of law a plaintiff cannot sue unless the parties agree to a balance, in the District Court the plaintiff can sue, but only *after a dissolution*. Here the plaintiff is merely the *indebitatus* counts, and therefore the question under the 8th section was not in issue. With regard to the seven items the Judge only stated the inclination of his opinion on the facts, but did not withdraw it from the jury.

(a) 2 Russ. & Myl. 347.
(c) 11 L. T., 267.

(b) 7 Beav. 328.
(d) p. 10.

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Innes in reply. It is submitted that this was a direction taking from the jury the consideration of these questions which were questions of fact. There was no distinction between one class of goods and another.

STEPHEN, C.J. I am of opinion that there must be a new trial. The Judge ought to have left to the jury to find whether the items or any of them had or had not anything to do with the partnership agreement, because as to such as had not, the plaintiff was entitled to recover, but the Judge has not done that. As to seven items, he expressed his opinion that they were not partnership matters, and the case says that "he advised the jury to withdraw from their consideration all articles in the particulars except the seven items that are marked," and one of the questions submitted is "that the Judge should have left it to the jury to say whether all the goods were within the terms of the agreement as a matter of fact." It is plain therefore that he did not leave the whole question to the jury. If he did do so, why should it have been left to us to decide whether he ought to have done so? I cannot help thinking that the learned Judge meant that there were seven items upon which, in his opinion, the plaintiff was entitled to recover. But he ought to have left to the jury the question what items had nothing to do with the partnership. As to the question whether the plaintiff was entitled, in an action framed like this, to recover items supplied under the agreement, I am of opinion that in this action he was not so entitled. If the jury found that all the items were supplied under the agreement, the plaintiff would not be entitled to recover at all, because I am of opinion that under this agreement (which is not put an end to) the plaintiff is only entitled to recover at the end of five years, and then only half of his (the plaintiff's) outlay. Whereas it is clear that he is suing for the whole amount that he has paid, on the ground that it was not supplied under the partnership agreement at all. If the plaintiff is entitled to recover at all in the District Court, for goods supplied to the partnership, he

must shew on the face of the plaint that he is going for an unascertained balance of a partnership account.

But suppose that the plaint was framed under sect. 8, the question would then arise, can he sue, pending the partnership? If he can, he can sue every six months. I have no doubt that he can sue at the expiration of the partnership; but I have some doubt whether he can sue pending the partnership; I do not decide this point—but I have great doubt for the reason I have expressed.

WISE, J. The three grounds of appeal must be supplemented by the question, was I right in so holding? and that being so, one question the learned District Court Judge asks, is whether in withdrawing from the jury the question as to the seven items he was right? And I think that he was not right. The question was whether they were supplied on individual, or on partnership account. The plaintiff says that they were supplied on the individual account of the defendant; the defendant says that they were supplied on the partnership account, and therefore that the plaintiff cannot recover; and the question, on which account they were supplied, ought, in my opinion, to have been left to the jury.

Suppose, however, that the jury found that the goods had been supplied on the partnership account, I think that in this action, the plaintiff could not recover with regard to any partnership transaction. Were it necessary now to decide the question the learned District Court Judge decided, I should take time to consider. But here, in this action, the plaint being framed as this plaint is, wherein the plaintiff is suing for his individual right, the plaintiff ought not to recover at all on any partnership account, as it seems to me that an amendment of the plaint, which would have been requisite to entitle the plaintiff to recover a balance due on the partnership account, is not within the scope of any of the clauses of the Act, enabling the Judge to make amendments. It is not necessary to decide the question as put by the case.

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We are of opinion that, in this action, the plaintiff can only recover for so much as the jury shall think was supplied to the defendant on his individual account.

June 30.

SULLIVAN *against* WILLSON (a).

Action on an agreement in writing between the plaintiff, defendant, and S., whereby the plaintiff agreed to let certain land to S., and defendant became surety with the plaintiff for the due performance of all the "covenants and agreements on the part of S., and for the payment of rent." Breach, non-payment of rent in arrear by S. or by the defendant. Plea on equitable grounds, that before the making the agreement it was agreed between the plaintiff and defendant and S., that the plaintiff should execute a lease under seal of the premises to S., and

that the same should contain the covenants in the agreement, and that S. should execute the lease containing such covenants, and that the defendant's liability to the plaintiff should be for the performance of such covenants by S.; and that the defendant signed the agreement on the faith and upon the condition that such lease and covenants should be executed by the plaintiff and S. Averment that no lease under seal was ever executed by the plaintiff or S., or any lease or covenants whatever. Held that the plea was an answer to the action.

(a) Before Stephen, C.J., and Milford, J.

mentioned, it was arranged and agreed between the plaintiff and defendant and *Souter*, that the plaintiff should execute a lease under seal of the premises to *Souter*, and that the same should contain the covenants in the agreement mentioned by the plaintiff and *Souter*, and that *Souter* should execute the lease containing such covenants, and that the defendant's liability to the plaintiff should be for the performance of such covenants by *Souter*. It then stated that the defendant signed the agreement on the faith and upon the condition that such lease and covenants should be executed by the plaintiff and by *Souter*. Averment that no lease under seal was ever executed by the plaintiff or *Souter*, or any lease or covenants whatever.

Demurrer and joinder.

Darley in support of the demurrer. It is submitted that the plea does not disclose such an equitable defence as is within the 48th section of the Common Law Procedure Act of 1857 (a); because a Court of Equity would not grant an absolute but only a conditional injunction—an injunction upon condition that *Souter* and the defendant should execute a deed under seal; but a Court of law cannot impose such terms. Thus, to an action on a covenant in a lease for rent, and for not repairing, a defence on equitable grounds of a part-performed agreement to surrender, was not allowed to be pleaded, because in Equity the defendant would have been entitled to an injunction only upon the terms of executing a surrender; and a Court of law had no power to order a surrender to be executed; *The Mines Royal Societies v. Magnay* (b), *Wodehouse v. Farebrother* (c). This is, therefore, not an equitable defence within the Common Law Procedure Act. Neither would a judgment for the plaintiff be a dishonest or unfair one, as it is admitted that the rent is due, and that the tenancy has been enjoyed. How can the defendant be injured by a sealed instrument not

(a) 20 Vic., No. 31. (b) 10 Exch. 489; 24 L. J. Ex. 7.
(c) 5 E. & B. 277; 25 L. J. Q. B. 18.

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having been executed? Unless *Souter* was before the Court as well as the plaintiff, a Court of Equity would not make any decree; and a Court of Law cannot do complete justice between the parties, and therefore will not do anything at all; *Schlumberger v. Lister* (a), *Wakley v. Froggart* (b). The plea is equally bad as plea at law; for the agreement to execute a sealed lease ought to have been in writing—and this is an attempt to add to or vary a written agreement by parol; *Taylor* on Evidence (c). The plea also relies on an agreement for a future lease; and such an agreement is required by the Statute of Frauds to be in writing, because it is a contract for an interest in land; *Foquet v. Moor* (d). He referred also to *S. N. P.* (e). [Stephen, C. J. What has the statute to do with the surety? This agreement, as between the landlord and the tenant, may have been void and inoperative, because by parol only. There may have been no agreement for a sealed lease, because none in writing. But is not the surety entitled to say this—"I was not to be liable, except on covenants in a sealed lease. I signed this paper, only on the 'condition' that there should be such an instrument. If for any reason whatever that condition be not preferred, I am free?"]

Darvall, Q. C., in support of the plea. The plea shows that there was to be no liability by the defendant, unless a lease under seal should be executed. The Statute of Frauds has nothing to do with the matter, as this condition was a collateral promise; and it is not necessary to allege on the face of the plea that it was in writing: *Kearns v. Durrell* (f). Properly considered the plea is one in denial, and not in confession and avoidance; it is equivalent to *non assumpsit*. For the defendant says, "I never became surety at all; I was to become surety by a deed, and this paper was to go for nothing, so soon as that deed should have been executed;

(a) 30 L. J. Q. B. 3.

(b) 33 L. J. Ex. 5.

(c) 2 Vol. 917.

(d) 7 Exch. 874.

(e) 2 Vol. 849.

(f) 6 C.B. 606; 18 L. J. C. P. 28.

I was to be liable only for the performance of the lessee's covenants to be contained in that deed." When the parties sign a document, apparently an agreement, but the expressed intention of the parties is, that it is to be an agreement only upon the happening of an event which has not occurred, until that event occurs, there is no agreement at all, *Pym v. Campbell* (a); and the law allows it to be shown that there was a previous oral arrangement intended by the parties to suspend the written agreement; *Wallis v. Littell* (b). Here the agreement was not to take effect at all, unless it was put in the form of a lease under seal.

A surety is entitled to take any objection however strict; and it is no answer that the defendant was not injured by the contract having been violated. But if it be violated, he has a complete defence at law. In *Blest v. Brown* (c), the Lord Chancellor lays down the doctrine in the largest terms, that a surety is bound only to the letter of his agreement; and if that engagement is altered in a single line, no matter whether it be altered for the benefit of the surety, or whether the alteration be innocently made, the surety has a right to say the contract is not that for which he engaged to be the surety, and he is entitled to be relieved from his engagement. Until *Souter* obtains from the plaintiff a lease under seal, the defendant incurs no liability whatever. He referred to *Bonser v. Cox* (d), *Rice v. Gordon* (e), *Evans v. Bremridge* (f), and *Watts v. Shuttleworth* (g).

Darley in reply. In *Pym v. Campbell* the evidence shewed that the agreement was not to take effect for a time; but here it is attempted to defeat the agreement altogether. If there were no binding agreement between the parties because no deed under seal was executed, was the agreement signed by all parties worthless? Was

(a) 6 E. & B. 370; 25 L. J. Q. B 277; see *Harris v. Rickett*, 4 H. & N. 1; 28 L. J. Ex. 197; and *Barker v. Allan*, 5 H. & N. 72; 29 L. J. Ex. 100; citing *Ridgway v. Wharton*, 6 H. L. C. 238.

(b) 31 L. J. C. P. 100.

(c) 8 Jur. N. S. 602.

(d) 4 Beav. 379.

(e) 11 Beav. 265.

(f) 25 L. J. Ch. 334.

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there no tenancy at all created ? But if there was a binding contract, it is submitted that it cannot be added to or varied without writing, and the defendant cannot take advantage of a stipulation which is itself idle and worthless. *Goss v. Lord Nugent* (a) decides that where an agreement is required to be in writing, any modification of its terms must also be in writing.

STEPHEN, C.J. Whether this plea be one in denial, or in confession and avoidance, it is not necessary to determine. But the matter set up in it is, we think, an answer to the action. What effect the existing written contract had, either as between the plaintiff and his tenant, *Souter*, or as between the plaintiff and this defendant, it is not material to enquire. It is sufficient to say that the defendant signed it alone on the faith and consideration that there should be a deed executed by the two under seal, and that he should be liable only for the covenants in that deed. If this be so, it is nothing to the purpose that it would have been perfectly immaterial whether the suretyship was for one or the other, the result being the same. The defendant is entitled to insist that whatever might be the effect of the signed paper, there was to be another of a more formal character for the covenants to be inserted in which, and no other, he was to be responsible. If the condition is broken, I am of opinion that the plaintiff cannot maintain this action. I am of opinion also that the Statute of Frauds has nothing to do with such a stipulation as this, which was collateral to and beyond the agreement, and neither varied the terms of the lease, nor of the defendant's agreement to be a surety for the tenant's performance of those terms.

MILFORD, J. The plea relies on a contract with which the Statute of Frauds has nothing to do. I think that the parol agreement has not been performed ; that agreement was that the defendant should be responsible

for the performance of certain covenants. But those covenants not having been entered into, how can he be responsible for such performance? I think he is not responsible either at law or in equity.

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Judgment for the defendant.

CUMMINGS *against* CLIFFORD.

June 21.

THE first count of the declaration stated a contract on 1st February, 1863, for the purchase of 4,000 sheep by the plaintiff from the defendant at the price of twelve shillings a head; the sheep to be delivered by the defendant to the plaintiff at a certain time, to wit, the 14th of March, 1863, at a station of the defendant's called Breadbow, and to be paid for by two promissory notes of the plaintiff in favour of the defendant, each for a sum of money equal to a moiety of the amount of the purchase money with $2\frac{1}{2}$ per cent. added to each such sum; one of such promissory notes to be payable at six months from the date of the contract, and the other at twelve months. Averment of the fulfilment of all conditions precedent to entitle the plaintiff to have the sheep delivered, and the agreement performed by the defendant. Breach, that the defendant, although requested so to do, did not deliver the sheep to the plaintiff.

The second count set out the same contract as in the first count, but alleged the breach to be that "although

with the agreement, and although the defendant delivered to the plaintiff part, to wit, 3,000 of the sheep, yet the defendant did not deliver the rest of the sheep. The third count was in the same terms as the second, with the additional averment that after the defendant had so delivered to the plaintiff the said part of the sheep, he took the same away from and out of the possession of the plaintiff, and resumed possession thereof, and disposed of the same to his own use, and refused to allow the plaintiff to take away the same.

Plea, that the agreement was a contract for the sale of goods for the price of £10 and upwards, and that the plaintiff did not accept any part of the goods so sold, and actually receive the same, nor did he give anything in earnest to bind the bargain, or in part payment, nor was any note or memorandum in writing of the bargain made and signed by the defendant, or his agent thereunto lawfully authorised.

Held a good answer to all the counts.

Sensible—that a plea pleaded to two different counts, but an answer to one count only, is not bad altogether, and on demurrer can be taken distributively.

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the plaintiff, in pursuance of the agreement, made and delivered to the defendant his (the plaintiff's) two promissory notes in favour of the defendant for the respective amounts, and payable in accordance with the agreement, and although the defendant in pursuance of the agreement delivered to the plaintiff part, to wit, 3,000 of the sheep, yet the defendant, although requested by the plaintiff so to do, did not deliver the rest of the sheep, but neglected and refused so to do."

The third count set out the same contract as in the two first counts, and alleged the same breach as in the second count, with the additional averment that "after the defendant had so delivered to the plaintiff the said part of the sheep, he took the same away from and out of the possession of the plaintiff, and resumed possession thereof, and disposed of the same to his own use, and refused to allow the plaintiff to take away the same."

Plea, that the agreement declared on was and is a contract for the sale of goods for the price of ten pounds and upwards, and that the plaintiff did not accept any part of the goods so sold, and actually receive the same—nor did he give anything in earnest to bind the bargain or in part payment, nor was any note or memorandum in writing of the bargain made and signed by the defendant, or his agent thereunto lawfully authorised.

Demurrer and joinder.

Isaacs in support of the demurrer. The plea, that there is no acceptance within the Statute of Frauds, is no answer to the second and third counts, which allege that there has been a delivery of part; for such delivery must be taken to be accompanied by a receipt by the plaintiff, or there would have been no delivery. The law is correctly laid down in the note to *Smith's Mercantile Law* (a), commenting on *Boulter v. Arnott* (b). And as the plea is pleaded to the three counts—if it is bad as to two of the counts—it is bad altogether; *Chappell v. Davidson* (c).

(a) note (g), p. 472 [5th Ed.] ; p. 499 [6th Ed.]

(b) 1 C. & M. 333.

(c) 18 C.B. 194; 25 L.J.C.P. 225.

Stephen in support of the plea. If there cannot be a delivery without acceptance, a plea traversing the acceptance or receipt by the plaintiff amounts to an argumentative denial of a complete delivery to him. The plea does not confess such a delivery as would sustain a count for goods sold and delivered. But even if such a delivery were admitted, the authorities are distinct that there may be a delivery sufficient to support an action for goods sold and delivered, and yet no receipt and acceptance within the Statute of Frauds. Such acceptance must be after the purchaser has exercised his option, or has done something to preclude him from doing so, *Hunt v. Hecht* (a); although where goods or the *indicia* of the property in goods remain long under the control of the vendee, especially where he has in any respect acted as owner of the goods, there may be sufficient evidence of such an acceptance, although the goods themselves are not received; *Meredith v. Meigh* (b).

Isaacs in reply. But the plaintiff himself is the party who asserts or admits the delivery, and therefore he must be taken to admit or assert a receipt and acceptance. And there is, moreover, the allegation of the plaintiff having made and delivered to the defendant his two promissory notes for the purchase money.

STEPHEN, C.J. As to a plea which is pleaded to two counts, and is a good answer if taken distributively to one of them only, such plea will be sustained as to the one, though it is bad as to the other of the counts, and there can be judgment accordingly, as in *Blagrave v. Bristol Water Works Company* (c). But where a plea is pleaded to an entire count, and it is good as to part (as for instance one breach) only it is bad altogether; *Dibbs v. Newcastle Coal and Copper Company* (d). In the present case it must be taken, as in *Morris v. Bunk of New South Wales* (e), to have been pleaded

(a) 8 Exch. 814; 22 L.J. Ex. 293.

(b) 2 E. & B. 374; 22 L.J. Q.B. 401. (c) 26 L.J. Ex. 57.

(d) 1 Sup. Ct. R., C. L. 248. (e) Id. 69.

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severally and respectively, and as a separate plea to each separate count. But it is unnecessary to decide this point now, as I am of opinion that it is good defence to all the counts. It has been admitted that it is a good plea to the first count, which is on the contract; and I am of opinion that it is also a good plea to the second and third counts. If the plea set up the fourth section of the Statute of Frauds, it would be a plea in confession and avoidance; for the words of that section are that "no action shall be brought," and it leaves the contract untouched. Such a plea would admit the contract, and say that no action could be brought upon it. But the seventeenth section says that no contract for the sale of goods shall be allowed to be good, except in certain specified cases; and that is equivalent to saying that except in such cases there is no contract. It therefore has been held to be an argumentative denial of any contract at all (a). This plea, therefore, which relies on the seventeenth section, is a plea in denial—for it denies that the contract stated in the declaration is a binding contract. Whether, however, it be regarded as a plea in confession and avoidance, or a plea in denial, it must be taken to admit or deny no more than the contract. But the delivery of the promissory notes, or some of the sheep in pursuance of the contract, is obviously no part of the contract; and therefore the plea is not to be taken as noticing in any way these allegations. They may be true or false; but they are not now in question. A contract in cases of this kind is primarily verbal, and then reduced to writing or acted on by part delivery or payment, as the case may be afterwards; and it may be doubtful whether any such delivery or payment can be traversed, for it is no part of the cause of action.

WISE, J. I am of opinion that the plea is good. The Statute of Frauds amounts to a denial of the contract; and there must be some mode by which the defendant can avail himself of that statute. The plaintiff has set out an agreement. The defendant pleads that

(a) See *Johnson v. Dodgson*, 2 M. & W. 657.

the agreement is within the seventeenth section of the Statute of Frauds ; and in his plea he negatives all the exceptions mentioned in that section. The rule of Court requires that the Statute of Frauds be specially pleaded ; and this appears to me the correct way of framing the plea. It amounts to an assertion that the statute has not been complied with. *Cusack v. Robinson* (a) is an authority that an acceptance of goods, as required by the 17th section, may be prior to the actual receipt.

A plea pleaded to two different counts may be good as to one count, and bad as to the other (b).

Judgment for the defendant.

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The QUEEN against MARIA COX.

August 28.

SPECIAL case, reserved for the consideration of the Judges, under 13 Vic., No. 8, by the Singleton Court of Quarter Sessions.

The prisoner was charged with larceny. At the close of the case for the Crown the prisoner's counsel called evidence to character ; and the learned Crown Prosecutor called witnesses in contradiction, and asked one of them the following question,—“ What is your opinion as to her honesty or dishonesty ?”

After objection taken, the evidence was admitted, and prisoner convicted and sentenced. The question was whether the evidence was admissible.

Buller, for the Crown, admitted that the evidence was wrongly admitted.

STEPHEN, C.J. The adverse opinion of the witness concerning the prisoner's character was improperly received. But we think, if we can see from the other evidence in the case, that the prisoner was, without any reasonable doubt, guilty of the offence with which she is charged, and especially that the objectionable evi-

Although it appears on a criminal case, reserved under the 13 Vic., No. 8, that inadmissible evidence has been, after objection taken, received at the trial, the Court will not give any effect to the objection if it appears from the other evidence in the case that the prisoner was, without any reasonable doubt, guilty of the offence, and especially if the objectionable evidence was not in any degree likely to have induced the conviction.

(a) 30 L. J. Q. B. 281 ; 7 Jur. N. S. 542.

(b) See *King v. Walker*, 33 L.J.Ex. 167, as to admissions by pleading.

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dence was not in any degree likely to have induced the conviction, that the Court will not give any effect to the objection. In *Balls' Case (a)*, it was laid down that if the case were clearly made out by proper evidence, in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, such a conviction ought not to be set aside because other evidence was given which ought not to have been received; but if the case, without such improper evidence, were not so clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. And this course was pursued in *Margaret Pinkler's Case (b)*.

Pell, on behalf of the prisoner, then commented on the evidence which had been transmitted with the special case.

Per Curiam. The evidence must be such as to leave no doubt of the guilt of the prisoner in the minds of reasonable men. We think, remembering also the fact that the prisoner was tried before for the same offence, and that the jury could not agree, that we cannot say that the evidence is so clear that the prisoner would have been found guilty if this improper evidence had not been received, and we therefore order the prisoner to be discharged.

Conviction quashed.

(a) R. & R., 132.

(b) R. & R., 133, note (b).

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PEACOCK *against* HANSON.August 29.
September 15.

MONEY had and received. Plea never indebted. The case was tried before *Wise*, J., in August, 1864, when it appeared that *Peacock* and *Gannon* and *Hanson* were entitled to certain land as tenants in common—that *Gannon*'s one-third became vested in *Hanson*, and that *Mrs. Hanson*, the defendant, who claimed through *Hanson*, was thus entitled to two, and *Peacock* to one, undivided third of the said land, that the entire property, about 16 acres, was let to one *Mrs. Briggs* by the defendant, in 1847, at a rent of £40 a year, that in 1852 the defendant raised the rent to £48, and that since that time the defendant had received that rent from *Mrs. Briggs*. It appeared that the plaintiff commenced a suit in equity against the defendant, and that in April, 1857, there was a decree for a partition, and that decree was carried out by a deed dated 13th May, and that the Master in Equity, under the same decree, took the accounts and made a report by consent on 1st December, 1858, finding that there was due from the defendant to the plaintiff, on account of the one-third part of the rents and profits, the sum of £189 19s., and this amount was paid in February, 1859, and a receipt given by the plaintiff. It appeared, however, that there was no change in the tenancy apparently, and that the defendant continued to receive from *Mrs. Briggs* the same rent as before. It was also shown that the defendant's attorney, *Mr. Graham*, had told *Mrs. Briggs* that she was only entitled to nine acres; and that the latter had replied, that if so the defendant must reduce the rent—and that the latter had refused to do so. Moreover, in May, 1859, the plaintiff had given a written notice to the defendant in the following terms—"I, *John Jenkins Peacock*, of, &c., the owner of all that piece of land (describing it), hereby require you to assist me in equal proportions to make and put up the dividing

The plaintiff and the defendant were tenants in common of some land, about sixteen acres; the former being entitled to one, and the latter to two, undivided thirds, and this land was let to *B*. A partition took place, and afterwards there being no change in the occupation, but all the parties knowing that there had been a change in the ownership, and that the plaintiff had seven acres and the defendant nine acres exclusively under the partition, the defendant continued to receive the rent of the whole. Held that the plaintiff could not recover from the defendant one-third of the rents thus received in an action for money had and received.

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fence between the said land, and the nine acres of land in the parish, &c., now in the occupation of one *Briggs*, of which last mentioned land you are the owner." Upon these facts the learned Judge being of opinion that the action would not lie, directed a verdict for the defendant, with leave to the plaintiff to move to enter a verdict for £96, being one-third of the rent received since the accounts had been taken by the master, if the Court should think the action maintainable; the Court to be at liberty to draw any inferences they might think right from the facts.

August 29.

Darley according, having obtained a rule.

September 15.

Stephen, for the defendant, showed cause. Although the same rent was received after the partition as before, and there was no change of occupation, yet it is submitted that the evidence shows that the tenant, Mrs. *Briggs*, as well as the plaintiff and defendant, knew well that there had been a change in the ownership, and that the plaintiff had seven and the defendant nine specific acres out of the sixteen occupied by Mrs. *Briggs*; and the correct inference is, that the defendant received the rent as for her own nine acres exclusively. But even if she received the rent as for the whole sixteen acres, it is submitted this action will not lie, as there is no privity whatever between the parties. How is the rent to be apportioned? Is the plaintiff entitled as for money specifically received to his use to a third of the rent or to seven-sixteenths? Assuming that there was, notwithstanding the partition, a continuance of the tenancy, the tenant would pay the rent for the whole land, and there could not be a severance of the rent into particular portions, because each portion of the rent issues from the whole land; and it cannot be, therefore, that the defendant received any particular portion of the rent for the use of the plaintiff; and if the tenancy in common continued, *Thomas v. Thomas* (a) is an express decision that an action for money had and received will not lie

where one such tenant has received more than his share of the profits.

Darley contra. The decree, or the partition under it, ascertained that the seven acres were equivalent to one-third in value of the sixteen acres, and the circumstances show that the defendant was in effect the agent of the plaintiff with respect to that portion. The deed of partition was in May, 1858; the accounts were taken by the master up to October, 1858; and in December, 1858, the report of the master was taken by consent. By this consent, in December, the defendant admitted that she had received £16 a year as agent for the plaintiff, after the deed of partition in the previous May, and she accordingly paid over a portion of the money to the plaintiff, and took a receipt. The tenancy of Mrs. *Briggs* was a tenancy from year to year, ending on the 1st of October, and she was not affected by the deed of partition; and her existing tenancy could not be got rid of till October 1st, 1859, by notice to quit signed by both parties, given on April 1st. It is submitted, therefore, that as the defendant received the entire rent, she received the one-third as the plaintiff's agent. But it is submitted that a sufficient privity between these parties is shown to support this action; for it is maintainable wherever the money of one man has, without consideration, got into the pocket of another—and still more so where that event has been brought about through the medium of a fraud; *Hudson v. Robinson* (a). *Litt v. Martindale* (b) was decided on this principle; in that case *A.* employed *B.*, a broker, to purchase a security for him, for which purpose he remitted to him a letter of credit for £2,010, on a bank payable to *B.* or order; *C.*, who had had dealings with *B.*, in the course of which the latter became indebted to the former in £1,940, under pretence of borrowing the money for a few days, and knowing that it was *A.*'s money, induced *B.* to part with it, and then insisted upon applying it in discharge of *B.*'s debt to him; and the Court held that *A.* might

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recover the amount from *C.* in an action of this kind, as having been obtained from *B.* by a gross fraud. The decisions in *Stephens v. Badcock* (*a*) and *Sims v. Brittain* (*b*), which are relied on by the defendant, proceeded on the principle that the defendants were under a contract to pay someone else.

STEPHEN, C.J. The present is a hard case; but such cases will arise when people do not manage their property with proper care. I am of opinion that the plaintiff cannot recover in this action, as there is nothing to show that the defendant was the agent of the plaintiff. I think that the evidence of *Graham* disposes of that part of the case. It appears that he said to Mrs. *Briggs* that Mr. *Peacock* was entitled to seven acres, and Mrs. *Hanson* to nine acres; and that Mrs. *Briggs* replied "if so, Mrs. *Hanson* must reduce my rent"—and that the latter said she would not. I think this shows that Mrs. *Hanson* intended to get all she could; but not that she ever acted as agent for Mr. *Peacock*. The cases of *Bliss v. Collins* (*c*) and *Harrison v. Barnby* (*d*) show that Mrs. *Bliss* was not bound to pay any rent to any one until the rent had been legally apportioned by a jury, or she had concurred in the apportionment made between these parties. She might have said, "I take from the two jointly, and I will not pay each separately—and until you agree I will not pay either." In that case, *Peacock* might have brought his action for the amount which the jury should say was his proportion of the entire rent; for a jury might have apportioned the rent due to each in an action brought by each. But Mrs. *Hanson* has gone on receiving this rent without any title. She has obtained money to which she was not entitled; but that does not entitle the plaintiff to sue her for it. The plaintiff had and has his remedy against Mrs. *Briggs* for the amount of the rent. I also think that there was evidence of a new state of things when Mrs. *Briggs* was told that there was a separate ownership as to the seven

(*a*) 3 B. & Ad. 354.
(*c*) 5 B. & A. 876.

(*b*) 4 B. & Ad. 375.
(*d*) 5 T. R. 246.

and the nine acres. She may have gone on dealing with the defendant, under a new agreement to pay the former rent for the nine acres. I am of opinion, therefore, that the defendant has received the rent either for herself, claiming the same for the nine acres—or as to part, it may be two-thirds, for herself, and as to the remaining one-third, for the plaintiff. But she was not an agent for the plaintiff (who was a stranger to her) in the matter, and therefore he is not entitled to bring this action.

MILFORD, J. I am of opinion that this action will not lie. The plaintiff and defendant are either tenants in common, or strangers with respect to the quality of the estate they held in this land. If they are tenants in common, *Thomas v. Thomas* (a) is an authority that the action will not lie. If they are strangers, in order to support the action it must be contended that if *A.* receives the rents of property belonging to *B.*, it is sufficient to entitle the latter to sue the former in this form of action. I am of opinion that under such circumstances an action would not lie. But even if it be assumed that the plaintiff and defendant were originally tenants in common, that they afterwards let the land, and that they afterwards apportioned the reversion, I am of opinion that until the rent was duly apportioned the tenant was not bound to pay the rent to either; he might say he did not know how much to pay to one, and how much to the other. If, however, the tenant pays the whole rent to the one, it is paid in his own wrong; but the other has no right as against the rent thus wrongfully paid.

WISE, J. Sufficient facts were not shown to bring the plaintiff within that class of cases where an action for money had and received will lie. There was not enough shown, in my opinion, from which an agency could be implied. It has been argued that after the partition, this agency was recognised in the taking the accounts in the Master's office. But that must be con-

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sidered with all the other circumstances—remembering that the accounts were taken in the carrying out the partition; that afterwards notice was given to the tenant that the partition had taken place; and that we find that afterwards the plaintiff sent to the defendant the letter, requiring her to assist in putting up the dividing fence between his seven acres and the nine acres "now in the occupation of one *Briggs*, of which you are the owner." This letter is inconsistent with a tenancy by Mrs. *Briggs* under them for the whole land, or with any dealing with her on that footing, and seems to me to show that the defendant did not act as agent for the plaintiff.

It has been decided that if they are tenants in common, this kind of action will not lie. But if the tenancy in common was put an end to by the partition, there must be an apportionment of the rent either by the agreement of the different parties, or by the decision of a jury. It may be suggested that Mrs. *Briggs* has attorned to the plaintiff, and that the latter can now sue her. In such action additional facts might be shown; and the fact of the defendant succeeding in this action does not necessarily show that the plaintiff would succeed in that action. I give no opinion on the matter (a).

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On July 1, 1858, H. leased certain premises to K., for five years, and on 29th June, 1860, H. mortgaged the same premises to M.; but this deed was not executed by M. On the 24th December, 1861, K. executed and H. accepted a deed of surrender in consideration of £150 paid, and thereupon H. resumed possession. On 10th December, 1862, M. gave K. notice of his mortgage, and claimed all the then overdue and all the after accruing rent. In an action by M. against K. for rent accrued since the date of the notice of the mortgage, Plea, surrender by act and operation of law to M. Held that there was no evidence in support of the plea, and that the plaintiff was entitled to recover.

(a) See *Powis v. Smith*, 5 B. & A. 850.

(b) The first count of the declaration will be found in 2 Sup. Ct. R., C.L. 270.

the said rent became due, the demised premises and all the residue of the term then to come and unexpired therein were duly surrendered to the plaintiff by act and operation of law. 3. As to the second count, never indebted. Issue thereon.

It appeared at the trial before *Wise*, J., that one *Hopgood* leased the premises in question to the defendant from the 5th July, 1858, for five years—that *Hopgood* executed a mortgage of the same to the plaintiff, on the 29th June, 1860, with a proviso for redemption on 29th June, 1863, by payment of principal and interest, and also that until default in payment of the principal and interest, or any part thereof, &c., the mortgagor should hold, &c.; but this deed was not executed by the mortgagee; that the defendant, the lessee, in ignorance of the mortgage, surrendered the premises and his term to his landlord, the mortgagor, by act and operation of law, on the 24th December, 1861. The defendant in fact executed, and the mortgagor accepted, a deed of surrender in consideration of £150 paid, and thereupon the latter resumed possession of the premises. After this—namely, on the 10th December, 1862, the plaintiff (the mortgagee) gave notice of his mortgage to the defendant, and claimed all the then overdue, and all the after accruing rent. But it was proved that the plaintiff advertised the premises for sale or to lease, in March and April, 1863. It appeared that there were arrears of interest on the mortgage to a considerable amount. The learned Judge intimated his opinion that there was no evidence for the jury in support of the second plea. *Darley*, for the defendant, requested that it should be left to them to find whether *Hopgood* was not the plaintiff's agent for accepting the surrender, and whether the acts of the plaintiff in advertising the premises for sale or lease did not amount to a ratification of *Hopgood's* act in accepting the surrender; and he contended that at any rate the defendant was entitled to deduct from the amount due the amount paid for the surrender. But the learned Judge directed the jury to find a verdict for the plaintiff, and reserved liberty to the defendant to

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enter a verdict for him, or to reduce the damages, if the Court should think right.

Darley obtained a rule *nisi* accordingly, against which *Darrall*, Q.C., and *Sheppard* showed cause. Although *Hopgood*, the mortgagor, was left in possession, and had therefore authority to collect or to distrain for rent, which might be for the benefit of the mortgagee, he had no authority to accept a surrender of a lease, and thus defeat the mortgagee. The surrender was not to *Hopgood* as agent of the plaintiff, but as the owner of the reversion; and there could be no ratification by the plaintiff, for it was not an act done in the plaintiff's name. The defendant ought to have enquired for and to have obtained the counterpart of the lease, and cannot now complain of consequences brought about by his own laches. If the plaintiff had redemised to *Hopgood*, or regranted until default on a day certain, and there had been no default at the time of the surrender, there might have been a difficulty in saying that the mortgagor was not still at that moment seised of the reversion. But the plaintiff did not execute the mortgage deed, and therefore, notwithstanding a clause to that effect in the deed, there was no redemise or grant; *Doe v. Wiggins* (a). [*Milford*, J. A mortgage not executed by the mortgagee might operate as a reservation by the mortgagor.] The £150 cannot be set off, for it was not paid as rent, but to get rid of the obligation to pay rent.

Darley contra. It is submitted that the acting by the mortgagee under the mortgage is equivalent to execution of it by him. Where there is a tenancy under a lease executed prior to a mortgage, all acts between the tenant and mortgagor are good as against the mortgagee, until notice of the mortgage, and therefore the mortgagee is not entitled to rent which the mortgagor is not entitled to recover. At common law the attornment of the tenant would have been necessary to entitle the mortgagee to

the rents ; but the effect of the statute, 4 Anne, c. 16, ss. 9 and 10, is to place a tenant, as soon as he has notice of the mortgage deed, in the same situation as if he had attorned to the mortgagee, with this exception, that he is not to be prejudiced by any act done by him as holding under the grantor, until he has had notice of the mortgage deed ; *Pope v. Biggs* (a). The defendant paid *Hopgood* a hundred and fifty pounds for the surrender, and therefore *Hopgood* could not have sued for the rent. It was accepted as or in lieu of rent. For the same reason neither can the plaintiff recover with regard to rent, which has accrued since the notice was given. Nothing was in arrear at that date. By the mere fact of notice, the mortgagee cannot forthwith cause the tenant to hold of the mortgagee ; *Evans v. Elliott* (b). [*Wise, J. Trent v. Hunt* (c) is an authority that the mortgagor can distrain for rent in the mortgagee's name as his bailiff ; and that shews that he is not his agent to release it before it becomes due.] It is submitted that the mortgagee has the same but not greater rights against the tenant than the mortgagor has, *Rogers v. Humphreys* (d) ; and therefore cannot recover rent which the latter was not entitled to. He referred to *Furlong* on Law of Landlord and Tenant (e), and *Coote* on Mortgage (f).

STEPHEN, C.J. I am of opinion that there ought to be no new trial. It has been said that there was no rent in arrear, because the payment of the £150 deprived *Hopgood* of the right to sue for rent. The cases referred to seem to me clearly against the defendant. The consideration paid for the surrender was not paid as rent, or even instead of rent ; it was paid in truth and in fact for *Hopgood*'s abandonment of the character of landlord, and therefore of all right thereafter to receive rent. How then can the defendant a year afterwards, when he receives notice of a demand from the mortgagee, say, "I

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(a) 9 B. & C. 252.

(b) 9 A. & E. 353.

(c) 9 Exch. 14; 22 L.J. Ex. 318.

(d) 4 A. & E. 299.

(e) 1 Vol., 381

(f) p. 322.

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have paid all the rent to this day, and so am not liable to you over again?" And if the law as contended for be correct, does it not come to this that the mortgagor, though utterly without title and having no reversion, may accept the surrender of his assignee's interest or rather title? which will operate, although there be no title whatever in the surrenderee, unless and until the mortgagee though with the legal title shall give notice of such title.

I am of opinion that there was no evidence whatever of a surrender by act and operation of law; the act relied on was valueless, and therefore, also, there could not be any ratification of it.

MILFORD, J., concurred.

WISE, J. The *4 Anne*, c. 16, s. 9, says that no attorneyment shall be necessary; and that grantees of the reversion shall be in the same position without attorneyment as they would have been before the statute if there had been an attorneyment, except in cases protected by the proviso in the 10th section. That section provides that no such tenant shall be prejudiced by payment of any rent to any such grantor. The defendant did not pay the rent, and therefore he is now liable to pay it to the mortgagee. I also think that there was no case for the jury.

Rule discharged.

September 6.

CULLAN against PEARSE.

A sale of a then growing crop of oranges with power to the purchaser to enter and pick them during the ensuing eleven months, is not a sale of an interest in or concerning land within the 4th section of the Statute of Frauds.

APPEAL from the Metropolitan and Coast District Court, holden at Parramatta.

"This was an action in which the plaintiff sought to recover damages for the alleged breach of an agreement, relative to the sale of a growing crop of oranges. The

case was tried before me without a jury, at Parramatta, on the seventh day of April, 1864."

The case then set out at length the plaint, which, after alleging a contract of sale by defendant to the plaintiff of "all the then growing crop of oranges in the defendant's orchard" for £500, and that "the plaintiff should have the right of picking the said oranges," stated that it was the defendant's duty to take due and proper care of the said oranges, and to prevent the same from being injured and destroyed. Breach, that the defendant neglected the alleged duty, and refused to deliver the whole of the oranges, or to take due care of them, &c.

Plea, the fourth section of the Statute of Frauds.

The appeal case then stated that "there was no written evidence of the contract disclosed in the plaint; but the plaintiff gave evidence of a verbal contract by which the defendant agreed to sell a crop of oranges then growing on the trees, for the sum of £500—a cheque for which amount was given by the plaintiff and paid. The oranges were at various stages of growth at the time the contract was made, on the 17th May, 1862, and the plaintiff was to have the right of picking the oranges till the first day of May following. After the contract was made, the plaintiff commenced and continued to pick the oranges till the 16th of April, 1863, when he was prevented from picking, and the defendant refused to deliver any more oranges to him. The action was brought to recover damages for this alleged breach of agreement. It was assumed, for the purpose of the argument which took place on the motion for a non-suit, that orange trees were not indigenous, but required care and cultivation. A non-suit was moved for on behalf of the defendant, on the grounds that the plaint disclosed a contract not to be fulfilled within a year, and that a contract for the sale of a growing crop of oranges was a contract in or concerning an interest in land, and within the fourth section of the Statute of Frauds. After argument on a refusal to be non-suited, I found a verdict for the defendant on the latter ground.

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Notice of appeal having been given on the ground of my having erroneously decided. The question for the decision of the Supreme Court is whether I was correct or not.

ALFRED CHEEKE,
Judge of the Metropolitan and Coast District Court."

September 7. *Windeyer* for the appellant. The oranges were merely chattels, and the land was their warehouse ; and the purchaser might have chosen to take off the crop the next day, and so there could have been no continuing interest in the land. He had no right to the possession of the land ; but only an easement, a right to come upon the land to pick them and carry them away ; *Evans v. Roberts* (a). In this case a growing crop of potatoes was held to be mere chattels. The latter cases confirm the doctrine that the transaction takes its character of realty or personality from the principal subject matter of the contract and the intention of the parties, and therefore a sale of any growing produce of the earth, reared by labour and expense in actual existence at the time of the contract, is not a sale of an interest in land. [Stephen, C.J. *Rodwell v. Phillips* (b) seems to decide that all "annual" productions, as for example productions altogether annual, as potatoes or hops, or perhaps corn, are or may be deemed chattels ; but that all productions which nature brings forth only after human industry has once planted them, are of the nature of realty, as being an interest in land.] It is submitted that the decision in that case was on the Stamp Act, 55 G. III., c. 184, and does not govern the present. He referred to the notes to *Duppa v. Mayo* (c), and the cases there cited.

Powell for the respondent. This case is concluded by *Rodwell v. Phillips*, which was a sale of growing fruit. Lord *Abinger* there says—" We think this case ought not to be governed by any of those in which it is decided

(a) 5 B. & C. 835.

(b) 9 M. & W. 501.

(c) 1 Wms. Saunds., 277 c., note f. ; See 1 Greenleaf, a. 271.

that a sale of growing crops is a sale of goods and chattels. Growing fruit would not pass to the executor, but the heir." [Wise, J. In *Washbourn v. Burrows* (a), the Court says—"When a sale of growing crops does, and when it does not, confer an interest in land, is often a question of much nicety; but certainly when the owner of the soil sells what is growing on the land, whether its natural produce, as timber, grass, or apples, or *fructus industrielles*, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse, for what is to come to him merely as a personal chattel."] In the present case the purchaser was to sever the fruit, and in order to do so he must have obtained a certain interest in the land. [Wise, J. In *Rodwell v. Phillips* the marginal note is not supported by the judgment; the defendant argued that it was an interest in land; the other side take no notice of that argument. But the Court merely decide that it is not a sale of goods and merchandize.]

Cur. ad. vult.

The following judgments were now delivered:—

STEPHEN, C.J. In this case the contract was not merely for the sale of a crop of fruit then ripe, and to be gathered immediately or soon afterwards, so that no continuing nourishment from the soil was contracted for, or necessary, but it was for the sale of the fruit as it then stood on the trees, in all its stages of vegetation —some of it, as is common with the orange, scarcely formed, although a large portion was ready for instant gathering. The purchaser, accordingly, was allowed nearly a year for gathering the fruit; he having the right to enter on the land, at any time, for that purpose.

Now (however subtle and valueless the distinction may be), the judgment in *Rodwell v. Phillips* appears to me to deduce this rule from the several cases; that all productions of the soil entirely annual, and the result altogether of the industry applied to them, such as potatoes,

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hops, and corn, and probably standing hay also, may be deemed chattel interests; but that those productions which nature rather than man annually brings forth, although human industry originally prepared the ground for, or even planted them, such as fruit growing on trees, are regarded as interests in land within the terms of the statute. The fact of still continuing vegetation, it would seem, is considered equally material. Thus, in the potato case of *Parker v. Staniland* (a), Lord *Ellenborough* observes—"It is probable, that in the course of nature the vegetation was at an end. But, be that as it may, the potatoes were to be taken by the defendant immediately; and it was quite accidental, if they derived any further advantage from being in the land." On the other hand, the substantial reason given in that case and others for holding that the sale was of a chattel interest only—namely, that the purchaser acquired thereby no possessory claim on the land, but merely a right to enter on it for the purpose of taking the crop sold him—applies, quite as forcibly, to annual productions of both kinds.

The distinction itself, if one may be permitted to say so, does certainly appear too minute and unsubstantial to be satisfactory. There are distinctions in this class of cases, however, more solid. A sale or lease of the entire herbage of a field, for instance, presents a difference (noticed by Lord *Ellenborough* in *Parker v. Staniland*) which is clear and intelligible. The purchaser or lessee, in the case supposed, could not effectually enjoy his right, without possession of the field; and he might, therefore, maintain an action of trespass for intruding into it.

I shall be glad, consequently, if the simple test suggested by Mr. Justice *Blackburn*, in *Wright v Stavert*, can be adopted consistently with the other authorities—namely, whether the contract would confer an interest or property in the land sufficient to sustain a possessory action; and, after conference with Mr. Justice *Wise*, and having read his judgment, I am of opinion on the whole that it may be so adopted.

(a) 11 East 362.

The case of *Rodwell v. Phillips*, I quite agree, is distinguishable from the present, as being a decision depending on the words of a Stamp Act. It was not necessary there, to hold that the agreement was one concerning an interest in land; for it was unenforceable, being unstamped, if founded on the sale of property, whether real or personal, unless it were also one relating to "good, wares, or merchandise"—of (we must presume) some particular kind. The contract in that case, therefore, may have concerned chattels or a chattel interest, merely, as opposed to an interest in land, and yet not have been within the exemption clause of the statute, as being either goods, wares, or merchandise. It might be, that, for the purposes of an enactment so framed, growing fruit was personal property—yet not goods, wares, or merchandise, within the meaning intended to be conveyed by those words. The legislature may have intended to exempt particular descriptions, only, of goods; as, for instance, such exclusively as were marketable and movable, and therefore ordinarily dealt with, and passing from hand to hand, as wares or merchandise.

The argument which was urged for the respondent, that growing fruit is in its nature real property because it goes to the heir, not to the executors of the owner of the soil, appears to me to be of little value. The case put assumes, of course, that the owner had not sold or contracted to sell the fruit, and so died owning both the tree and the fruit. The tree therefore passing to his heir, the fruit passes equally as part of or accessory to the tree. But this leaves the question untouched, whether the owner would or not, by so selling or contracting, have effectually severed this right; and whether a man, by selling the fruit on his tree, sells or parts with any other interest in them, or any interest in the soil on which they grow.

For these reasons, and the reasons assigned in the judgment of my colleague, I am of opinion that the contract now in question was not one concerning an interest in land, within the meaning of the statute against

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frauds; and there must, consequently, the District Judge having decided otherwise, be a new trial. The costs of this appeal are given to the appellant. Over the costs below, as to either trial, we have no jurisdiction.

WISE, J. The question in this cause is whether the sale by parol of a growing crop of oranges to be picked by the buyer, is a sale of any interest in or concerning lands under the 4th section of the Statute of Frauds, so as to preclude the vendee from suing the vendor, who, after receiving payment of the purchase money, refuses to allow him to continue to pick the oranges.

It was said by Lord Abinger, in *Rodwell v. Phillips* (a), "There is a great variety of cases in which a distinction is made between the sale of growing crops and the sale of an interest in land; and it must be admitted, taking the cases altogether, that no general rule is laid down in any one of them that is not contradicted by some other."

It is desirable, therefore, if possible, to decide the present case upon principle rather than by analogy to any particular decision.

Now, in *Jones v. Flint* (b), the Court of Queen's Bench, after referring to various cases as to the purchase of crops, stated that the safer grounds of decision are, the legal character of the principal subject matter of sale, and the consideration whether in order to effectuate the intentions of the parties it is necessary to give the vendee an interest in the land. Accordingly, in that case, the sale of a crop of corn to be reaped by the purchaser, who was to have the profit of the stubble afterwards, and also some potatoes growing on the land, and whatever lay grass was in the fields, was held not to be within the 4th section of the Statute of Frauds. The fact of the vendor's having by the contract reserved to himself the right of turning his own cattle on to the fields, was held to show that the possession of the land remained with the vendor, and the Court recognised the decisions that established that a mere right to enter to obtain the produce of the land did not constitute an interest in the land.

(a) 9 M. & W. 501.

(b) 10 A. & E. 753.

within the meaning of the statute. The same principle was laid down in *Purker v. Staniland* (a), in which the sale of a crop of potatoes at so much a sack, the vendee to get them out of the ground immediately, was held not to be within the 4th section. "It does not follow," said Lord *Ellenborough*, "that because the potatoes were not at the time of the contract in the shape of personal chattels, as not being severed from the land, so that larceny might be committed of them, therefore the contract for the purchase of them passed an interest in the land within the 4th section of the Statute of Frauds. It is probable that in the course of nature the vegetation was at an end; but be that as it may, they were to be taken by the defendant immediately, and it was quite accidental if they derived any further advantage from being in the land. This differs the present case from those which have been cited. The lessee *prima vestura* may maintain trespass *quare clausum fregit*, or ejectment for injuries to his possessory right; but this defendant could not have maintained either, for he had no right to the possession of the close; he had only an easement, a right to come upon the land for the purpose of taking up and carrying away the potatoes, but that gave him no interest in the soil."

Now, applying this principle to the present case, it is clear that the purchaser had no right whatever to any portion of the land on which the orange trees grow. The vendor could do what he liked with it during the period that the crop of oranges was being picked; the purchaser of the crop could not have brought trespass against any person who had gone into the orangery without his consent.

But it was contended by Mr. *Powell* that *Rodwell v. Phillips* was an express authority by which the Court must be bound. On examination, however, of that case, it will be found to be only a decision upon the Stamp Act, and not upon the Statute of Frauds. Lord *Abinger*, indeed, held at the trial, that the sale of crops of fruit and vegetables then growing in the garden was the sale

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of an interest in land, but the argument turned on the effect of the exception in the Stamp Act. On reference to the Stamp Act, it appears that any conveyance, "whether grant, disposition, transfer, or any other kind or description, upon the sale of any lands or other property real or personal," is liable to a stamp; but that any agreement relating to the sale of any goods, wares, or merchandise, is exempted from stamp duties. Lord *Abinger*, indeed, at the trial, had ruled that the document in question was the sale of an interest in lands, but, in giving the judgment of the Court, he said as follows:— "There seems to be no doubt that this was a sale of that species of interest in the produce of lands which has not been excepted by the Stamp Act, and that it is not a sale of goods and merchandise, and the contract was of sufficient value to require a stamp." The decision, therefore, is not that the contract was an interest in lands within the Statute of Frauds, and is not a binding authority upon that statute, especially when so to hold it would be at variance with other cases. Other instances might be given of agreements requiring a stamp as not within the exemption, such as the sale of railway scrip.

This clause of the statute was discussed in a recent case of *Wright v. Stavert* (a).

It was there contended that an agreement for a year's board and lodging, terminable at a quarter's notice, was within the 4th section of the Statute of Frauds, but without success; and Mr. Justice *Blackburn* laid down a test of questions of this kind to be, "to look at the executory parol contract, and ascertain whether, if executed, it would have conferred such an interest or property in land as to give a right to maintain a possessory action."

I think that this test is in accordance with the earlier authorities, and, applying it to the present case, I am of opinion that this contract was not void because by parol, and there must be accordingly a new trial.

Judgment for the appellant.

(a) 29 L. J. Q. B. 161.

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THE QUEEN *against* CRITCHELL.

September 7.

SPECIAL case reserved for the consideration of the ^{A cheque drawn by H.} Judges, under the 13 Vic., No. 8. ^{was by H.}

"The prisoner was indicted before me at the last gaol delivery at Sydney, for the larceny of a cheque for £204—laid as the property of *William Hibberd*. ^{given to the prisoner to be by him delivered to W. for transmission to B., to whom H. was indebted.}

The prisoner is respectably connected, and was visiting persons of property in the Auckland and Manero districts on friendly terms. On the 17th February last, he called at Mr. *Hibberd*'s station, and remained there a night. Mr. *Hibberd* had known him and his family some years, and had on one or two occasions got the prisoner to fill up cheques for him. *Hibberd* happened to mention that he was about to send off the next day to Eden a messenger, to take a cheque to Mr. *Walker* (the clerk of Petty Sessions there) for £204. The prisoner immediately offered to deliver the cheque himself—saying that he was going to Eden, and should be sure to see Mr. *Walker* next day. The cheque, it appears, was for a Mr. *George Barclay*, to whom *Walker* was to deliver it; and the prisoner was so informed. The prisoner, after his volunteering to take the instrument, was asked by *Hibberd* to fill up a cheque for the amount stated, in favor of *George Barclay* or bearer on the Commercial Bank at Sydney. The prisoner did so accordingly, and Mr. *Hibberd* signed the cheque, and then enclosed it in an envelope—which the prisoner sealed, and addressed at *Hibberd*'s request to Mr. *Walker* at Eden. The prisoner had no authority whatever to use the cheque, or open the letter. He was to deliver it simply to Mr. *Walker*, and he undertook so to deliver it. ^{The prisoner was convicted of larceny of the cheque laid as the property of H. Held that the property was correctly laid in the drawer H.}

On the next day, the 18th February, it was proved that the prisoner was in Mr. *Walker*'s company and that on the same day both those persons and Mr. *Barclay* were at Eden; but the prisoner said not a word to *Walker* of the cheque or letter. On the same 18th of

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February, and also on the 19th, the prisoner was at the hotel of one *Macfie*, near Eden, to whom he owed between £3 and £4. The prisoner gave *Macfie* a cheque on the New South Wales Bank for £8 in payment, which he induced *Macfie* to take, and to give him above £4 cash in change, by exhibiting *Hibberd's* cheque—saying that he was about immediately to pay that into his (the prisoner's) account. *Macfie* believed the representation, knowing *Hibberd's* signature. On the 22nd February, the prisoner in person presented the cheque at the Commercial Bank, and demanded cash for it. An accidental circumstance led the cashier to make inquiries; in answer to which, the prisoner said that he had got the cheque from Mr. *Barclay* in payment of a debt. The cashier refusing to pay it without a reference, the prisoner went away. On the same day it seems, Mr. *Hibberd* received information from *Barclay*—the nature of which, of course, was not in evidence, but which it is impossible not to understand. The prisoner's next step was to deliver the cheque on the 25th, to a Mr. *Tidswell*, in Sydney, with directions to forward it to Mr. *Hibberd*. The object of this circuitous proceeding was obvious; but the cheque was enclosed by *Tidswell* to the prisoner's brother-in-law at Panbula, and never reached its destination. On the 2nd March, the prisoner was arrested at Newcastle. He immediately said, I am very sorry; it was very foolish of me; I have sent the cheque back to Mr. *Hibberd*.

Mr. *Barclay* was not called as a witness; but it was clearly unnecessary to call him, as the evidence of *Macfie*, Mr. *Walker*, the Commercial Bank cashier, and the constable, too plainly proved the fraudulent appropriation by the prisoner.

It was objected that the ownership of the cheque was in *Barclay*—not in *Hibberd*, who had parted with it by the delivery to the prisoner. I overruled the objection, but reserved the point, at the instance of the prisoner's counsel, for the opinion of the Court, in pursuance of the statute. Two other points were reserved as to the *bailment* of the cheque; but these are disposed

of, by the express finding of the jury that the prisoner intended to appropriate the cheque to his own use from the outset.

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Isaacs for the prisoner. The property in the cheque should have been laid in the payee, *Barclay*, the person for whom it was drawn, or in *Walker*, the person to whom it was to be delivered by the prisoner in order that it might be transmitted to *Barclay*. *Walsh's Case* (a) is a distinct authority that a cheque cannot be called the goods or chattels of the drawer, because it is of no value while it is in his hands.

The *Solicitor General* for the Crown. The cheque was given to the prisoner at his own fraudulent instigation for *Walker*, to be delivered by him to *Barclay*. But there was nothing to shew that *Barclay* was entitled to the cheque, or that he or *Walker* had requested it to be sent or even knew of the intention to send any cheque to them. The prisoner therefore was a carrier; and where goods are delivered to a carrier by a consignor without any direction by the consignee as to their being sent by a particular carrier, the property in such goods remains in the consignor; *Coats v. Chaplin* (b). There was no order that this cheque should be sent by a particular mode of conveyance; and there was no usual course of employment of the prisoner, and the property is therefore rightly laid in *Hibberd*.

STEPHEN, C. J. The property was rightly laid in the drawer and sender of the cheque *Hibberd*. If he had wished so to do, he could have countermanded the order to the prisoner—and if the cheque had been lost, the loss would have been *Hibberd's*. There was nothing to vest the property in either *Walker* or *Barclay*, and *a fortiori* it was never out of *Hibberd*. For the prisoner obtained the instrument by a fraud, intending from the outset to appropriate it; and a person cannot by fraud become a bailee.

WISE, J., concurred.

Conviction sustained.

(a) R. & R. 220.

(b) 8 Q. B. 483.

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September 2.

Ex parte HEGGARTY.

The Court will consider all the circumstances, and exercise a discretion in granting or refusing a prohibition, under the Colonial Justices' Acts.

SALAMONS moved to make absolute a rule *nisi* for a prohibition, to restrain the prosecutor and certain justices from further proceeding in respect of a certain conviction made upon an information by *Wyse*, the prosecutor, against the applicant.

It appeared that an information on oath was laid by *Wyse* against the applicant, *Heggarty*, for an assault, and a summons was thereupon issued against him by the police magistrate. He did not appear on the day appointed, and the presiding justices then took evidence (but not of the constable supposed to have served the summons) to prove the service. This failing, the same justice issued a warrant against *Heggarty*, as if it was the first process against him, not noticing the fact of the previous summons. The appellant was taken under this warrant and gave bail to appear, and appeared accordingly but under protest. He objected to the jurisdiction of the justices, on the ground that he was illegally brought before them—but eventually pleaded not guilty. The case was then heard, and he was fined. The assault was of an aggravated character, having regard to its attendant circumstances, although, in fact, the prosecutor, having continued to evade the blows which were aimed at him with a horsewhip in his own carriage, in his wife's presence, was not actually struck.

Windeyer showed cause. The warrant was rightly taken under this warrant, and being present in Court protested against the jurisdiction of the magistrates,

11 and 12 Vic., c. 43, s. 2; but at all events any objection of this kind was waived by the defendant's appearance, and cannot now be entertained; *R. v. Stone* (a), *R. v. Aikin* (b), *R. v. Johnson* (c).

Semble, that even if B. was wrongfully in custody, the justices were not deprived of jurisdiction.

(a) 1 East 639.

(b) 3 Burr. 1785.

(c) 1 Stra. 261.

Salamons in reply. The warrant was issued wholly without jurisdiction, as by the 11 and 12 Vic., c. 43, s. 2, it can only be issued, "instead of issuing such summons as aforesaid;" and if the justice has issued a summons, he has no power to issue a warrant on the same information. And the justice had no jurisdiction under the 13th section, until the service of the summons was proved by the "constable or other person who shall have served" it. The defendant being compelled by the warrant to attend, cannot be said to have appeared; and the proceedings show that he asserted "that the bench had no jurisdiction." But this being a defect in jurisdiction and not a mere irregularity, cannot be waived by any acquiescence of the defendant. He referred to *Wilkinson's Australian Magistrate* (a).

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STEPHEN, C. J. I am of opinion that under all the circumstances this is not a case in which the Court is called on to interfere by prohibition; but as the statute gives the Court a discretion in the matter, we ought to refuse the writ applied for. And as unfounded charges have been made by the applicant against the justice who issued the summons and warrant, we give the latter his costs—not, however, the costs of the original hearing before *Milford*, J., by whom, on the points of law taken, this application was sustained, but the costs of this review by the full Court. We have consulted Mr. Justice *Milford*, who thinks the law very doubtful. But I shall intimate our present impression, in case the question be hereafter discussed. We are inclined to think that the service of the summons need not necessarily be proved by the summoning constable; the statute in this respect being directory only. But if otherwise, I think that the justice had a right, notwithstanding the issue of an abortive summons, to proceed by warrant on the sworn information, without noticing the summons or re-swear the prosecutor. No authority has been cited for the position contended for by the applicant; and I cannot see on what ground it can be supported. Thirdly, I altogether question the

(a) p. 177.

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position that, because a person is brought up by an informal warrant, the justices have no jurisdiction, even although he pleads. It is a startling proposition, for which no authority has been cited, and I do not think it is law.

In *Van Boven's Case* (*a*) it appeared that under the 58th section of the Smuggling Act, when any person shall have been taken before a justice, if it appear to such justice that there is cause to detain, he is thereby authorised to detain him a reasonable time, and at the expiration of such time he may be brought up before any two justices, who are thereby authorised and required finally to hear and determine the matter; and it was held that although there had been an illegal detainer by the justices, or the justices had improperly remanded the prisoner, the conviction was valid. So also in *Ex parte Hopwood* (*b*), where one of the defendants was an old man who did not actively interfere in the management of the factory in which the offence was committed, and the other, who was the person legally responsible, was absent from home, and was never personally served with the summons, or received notice of it before the hearing, the conviction was sustained, although it appeared that the defendant's attorney asked for an adjournment, offering to pay the costs occasioned thereby, and the justices refused the application for an insufficient reason. "If," says *Patteson*, J., "an attorney comes on behalf of the party, the magistrates cannot well doubt that the summons has been served; at all events, this objection does not go the length of taking away the jurisdiction. As to the want of evidence on matter of fact, that cannot possibly take away jurisdiction." I am strongly disposed to think, therefore, that even if the applicant was wrongly in custody, yet the justices who heard the case were not thereby deprived of jurisdiction—for that jurisdiction was given in this particular case by Lord *Landowne's* Act (*c*); and the provisions of Sir *John Jervis'* Act (*d*), as to the issue of the summons and

(*a*) 9 Q. B. 669.(*c*) 9 G. IV., c. 31.(*b*) 15 Q. B. 121.(*d*) 11 & 12 Vic., c. 43.

warrants, are enactments merely regulating the process for bringing the parties before the justices. It may be otherwise, if the justices could only have had jurisdiction, as is the case under some statutes, upon the party accused being duly brought before them.

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WISE, J. I give no opinion as to the validity of the warrant. In *Van Beven's Case* the Court abstained from considering the question (a).

Rule discharged with costs (b).

The QUEEN against WILLIAM FOGG, the younger. September 7.

SPECIAL case reserved for the consideration of the Court, from the Quarter Sessions at Yass, under the 13 Vic., No. 8.

"The prisoner above named was, on the 19th day of February last, tried before me at the Quarter Sessions at Yass, together with *William Fogg*, the elder, his father, on an indictment—a copy of which is annexed (c)."

At the close of the case for the Crown, Mr. *Walsh*, who defended the prisoner, applied for the discharge of *William Fogg*, the younger, on the ground that there was no evidence against him. This being so, I discharged him accordingly.

Two witnesses were then called and examined for the defence, one of whom was the aforesaid *William Fogg*, the younger. A copy of my note of his evidence is annexed (d).

(a) See *Ellis v. Brownrigg*, 2 Sup. Ct. R., C. L. 177; and on the question of waiver, *Ringland v. Lowndes*, 33 L. J. C. P. 25.

(b) This case was argued before *Stephen*, C. J., and *Wise, J.*, in the absence of *Milford, J.*, at his request, and with the express assent of counsel on both sides.

(c) In this information, the first count charged *William Fogg*, the elder, and *William Fogg*, the younger, with feloniously stealing, on the 1st of January, 1864, at the Fish River, one cow, &c., of the property of *William Fahey*; and the second count charged the same prisoners, at the same time and place, with feloniously receiving the same animal, knowing it to have been stolen.

(d) I was at my father's place on 2nd January. I killed an animal a little before sundown. That is the hide (pointing to the one produced). My father was three quarters of a mile off. He did not come home till an

The prisoner was indicted for feloniously unlawfully, and mali- ciously killing a cow. He pleaded *autrefois acquit*, and proved that he had been acquitted of stealing, and also of receiving the same animal. Held that the evidence did not prove the plea.

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The elder *Fogg* was found guilty of receiving the beast, knowing it to have been stolen—and not guilty on the first count. He was sentenced to twelve months imprisonment in Goulburn gaol.

The Crown prosecutor then informed me that he had another charge against *William Fogg*, the younger, whereupon he was taken into custody again and remanded till the next day, when he was arraigned on the indictment, of which a copy is annexed (a); and to which he pleaded—first, *autrefois acquit*—and second, not guilty. By consent of all parties the trial was postponed till the then following sessions.

At the sessions held at Yass, on Thursday, the 16th June last, the trial took place, and the jury were first sworn to try the issue raised on the plea of *autrefois acquit*. The clerk of the peace produced the certificate of the prisoner's acquittal, and the information and depositions in the first case, and said that he prepared the information in the second case from the depositions used in the first case, and that they related to a cow; and in reply to a question by Mr. *Walsh*, he said he could only presume that the cow was the same, as he knew of none other as far as the prisoner was concerned. This was the only evidence.

Mr. *Walsh* contended that the facts involved in the said charge would have warranted a conviction on the first, and that the offence was the same—and that the prisoner was entitled to a verdict on the plea of *autrefois acquit*.

hour after dark. He went into his room. Next morning I saw him when the sergeant came. No one was present when I killed it. I was by myself when I hung it up. I was by myself when I skinned it. Mother and father came up. Had not arranged to kill, nor mentioned it to no one. Never told my mother. Saw my father come up. I cut out brand to make rope.

To the Judge—I killed the cow out of spite to *Fahey*. I hung it on gallows for beef for the family. I made supper that night of some of the inside. I stewed it. I gave some to my mother and Livermore. Mother said, "Have you been killing?" I said "Yes." Never spoke to father; he went to bed. Never spoke to father about it. He never spoke to me about it. I did not tell him I had killed a beast. Did not hear constable say, *Fahey* only wanted the carcass. Only had a little conversation.

(a) In this information, *William Fogg*, the younger, was charged with feloniously, unlawfully, and maliciously killing, on the 1st January, 1864, at the Fish River, one cow, the property of *William Fahey*.

I told the jury that they had to consider two points. First, whether the offence charged in the first indictment was the same as that charged in the second ? and secondly, whether they both related to the same cow ? I proceeded to tell them what evidence was required by law in each case, and directed them, unless evidence necessary to be given in support of the one case was sufficient to procure a legal conviction in the other, which they would see from what I had told them was not the case, that the verdict must be for the Crown.

The jury accordingly returned a verdict on this issue for the Crown.

The prisoner was then tried on the plea of not guilty, and was found guilty, and sentenced to seven years on the roads or public works of the colony.

The question reserved for the consideration of the Supreme Court, is whether or not my direction to the jury was correct ?

F. W. MEYMOtt,
Chairman, Q.S."

Isaacs for the prisoner. The only point open for argument is, it is submitted, whether the direction of the learned Judge is correct ; and the Court will not allow the Crown to argue that the verdict was proved by the evidence, without, at all events, giving the prisoner an opportunity of being heard in reply.

Per Curiam. The Rule of 1st December, 1857, says that "the party at whose instance the special case was reserved shall begin, but have no right of reply." Upon the point stated, therefore, you have no reply ; but if the Crown contended that whatever the decision on that point might be, the verdict was right, in that case you would be allowed to reply.

Isaacs. The direction of the learned Judge cannot be supported. The proper question for the jury was, whether the facts charged as killing in the second indictment was the same as those charged as stealing in the first ; and would they, if proved, have been sufficient to justify a conviction on the first. It is submitted that

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the prisoner might have been convicted of the stealing on the same evidence on which he was convicted of maliciously killing ; and the case is therefore within the principle laid down in *Vandercombe's Case (a)*. [Stephen, C. J. A man committed a rape upon a child, and, by the same act, killed the child. Although he had been indicted and acquitted of the rape, he was afterwards indicted for the murder, and convicted and executed. There were two results from the self same thing. Wise, J. A man who is indicted for stealing a cow, the property of A., and acquitted, can be again tried for stealing the same property, laid as the property of B.; *Green's Case (b)*.] The offences were substantially the same, and the act done was the same; at all events the evidence in the case showed that the circumstances were exactly the same. If one be indicted for murdering another, by compelling him to take, drink, and swallow down a certain poison called oil of vitriol, whereof he is acquitted ; and he be again indicted for murdering the same person, by administering to him the oil of vitriol, and forcing him to take it into his mouth, so that by the disorder, choking, suffocating, and strangling occasioned thereby, he languished and died ; the former acquittal is a good bar—for the substance of the charge in both cases is the same ; *R. v. Clarke (c)*. The same principle applies to all other criminal charges ; the rule being universal, that if the first indictment were such that the prisoner could have been convicted upon it, by any evidence legally admissible, he cannot be tried again for the same offence ; *R. v. Sheen (d)*. And in a recent case where, on a complaint for a common assault by the party aggrieved, the justices, under the 9 G. IV., c. 31, s. 27, dismissed the case, it was held that their certificate of dismissal was a bar to an indictment for unlawfully wounding, and for assault causing actual bodily harm, arising out of the same circumstances ; *R. v. Ellington (e)*. [Stephen, C. J. By s. 28 the certificate is a bar " to all further proceedings for the

(a) 2 Leach 768.

(c) 1 B. & B. 473.

(b) 26 L. J. M. C. 17.

(d) 2 C. & P. 634. (e) 31 L. J. M. C. 14.

same cause." But I should doubt whether, if under such circumstances the justices gave a certificate, and afterwards the prosecutor died from the injuries received, the defendant could not be indicted and convicted of murder. The decision in that case, however, depends on the words of the statute.] He referred to *Hawkins*' P. C. (a).

Forbes, for the Crown, was not called on.

STEPHEN, C. J. It appears to me that the conviction on the second information was right, and so in substance was the direction of the learned Chairman of Quarter Sessions, who indeed gave to the jury the exact test that is laid down in *Archbold's* Criminal Pleading (b), and taken from *Clarke's* Case (c), whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first. In that case the prisoner had been acquitted on an indictment for murdering a child, by administering a certain deadly poison, to wit, oil of vitriol, and by forcing the child to take, drink, and swallow it down; she was then charged on an indictment for murdering a child, by forcing him to take into his mouth and throat oil of vitriol, by which he was suffocated; but the indictment did not allege that the oil of vitriol had been swallowed, or that it acted as a poison. But all the Judges held that it was immaterial whether it acted as a poison or not; and supported the plea on the ground that a verdict of guilty could have been properly found on the first indictment, by proving the allegations contained in the second. So in *Vandercombe's* Case, a prisoner was indicted for burglary, in breaking and entering a dwelling-house and there committing a felony, and was acquitted; and it was held that he might upon the same evidence be again indicted for burglary, in breaking and entering a dwelling-house with intent to commit a felony, because evidence of the breaking and entering with

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(a) 2 Vol., c. 35, s. 8; and see 3 Greenleaf on Evidence, s. 35.

(b) p. 120.

(c) 1 B. & B. 473.

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intent to steal, could not have supported the charge of having broken and entered the house, and having actually stolen the goods stated in the first indictment.

Could a verdict of guilty on the first charge have been properly found on proving the facts stated on the second; Clearly it seems to me that it could not. How could the the prisoner's killing a cow be proof of his having received or stolen it? In this case the decision in *Vandercombe's Case* is completely in point.

WISE, J. In *Button's Case* (a) it was contended that the defendants had been improperly convicted of a conspiracy, because it formed part of a felony in which it was merged; and in delivering the judgment of the Court, overruling the objection, Lord *Denman* says, "the same act may be part of several offences; the same blow may be the subject of enquiry in consecutive charges of murder and robbery; the acquittal on the first charge is no bar to a second enquiry where both are charges of felony—neither ought it to be when the one charge is of felony and the other of misdemeanor." Here the offence of shooting the cow was complete; the prisoner, when he was acquitted, proved that he had shot the cow, and something more. The jury believed his evidence on the first occasion; and it is satisfactory to know that they believed his evidence on the second, although it could hardly have been expected that they would have done so.

Conviction sustained.

(a) 11 Q. B. 946.

Ex parte RYAN.

June 17.

SALAMONS moved to make absolute a rule nisi In a case for a prohibition, under the Colonial Justices' jurisdiction is conferred on two magistrates, it appeared that A. was convicted by two magistrates, but the second magistrate was not present when the evidence was given, and he merely considered it as it appeared on the deposition in conference with the other adjudicating magistrate. Held that the conviction was wrong, following *R. v. Marrington*

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Acts, to restrain *G. Forsyth* and *W. E. Rogers*, Esquires, two justices, from further proceeding in respect of a certain summary conviction for larceny, under the 16 Vic., No. 6.

It appeared that the applicant, who was more than sixteen years of age was charged with stealing; that the examinations of the witnesses were taken before Mr. *Forsyth* on the 18th of May, 1864; that the prisoner was then remanded until the 19th, and then again remanded until the 20th; that on the 20th the prisoner was again brought up before Mr. *Forsyth* and Mr. *Rogers*, when the depositions were read over to the prisoner, but the witnesses were not re-called. The prisoner having elected to be tried summarily by the two justices, was then found guilty of larceny, to the extent of forty shillings, and sentenced to two months imprisonment with hard labor.

Butler appeared for the Magistrates.

STEPHEN, C. J. The second magistrate, Mr. *Rogers*, was not present when the evidence was given; he seems merely to have considered it in conference with the other magistrate, Mr. *Forsyth*, and therefore the conviction by the two is clearly bad. It was decided in 1850 by this Court, in *Marrington's Case (a)*, to be a mis-trial where jurisdiction was conferred by statute on two magistrates, and a prisoner was sentenced by two magistrates, one of whom was not present at any former portion of the case; and the same result would follow if the same two magistrates present on the second day of the trial were not present on the first

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day of the trial. It is clear, therefore, that these two justices had no jurisdiction, and we should have made this rule absolute with costs; but that it appears that the case was twice postponed for the attendance of a second magistrate, and that the applicant's advocate made no objection to the case being then decided by them, but then and there, on the contrary, made the election to be tried summarily.

WISE, J. Where magistrates appear and try to defend an illegal conviction, they ought, I think, to be made to pay the costs; and the rule recognised in Equity will, I trust, in time be generally followed in magistrates cases. But, in this case, I think the magistrates only appeared because the rule was asked with costs, and they may have been advised to point out to this Court how the blunder arose. If they had not appeared, costs might have been given against them.

It is quite clear that the conviction is wrong, as has already been decided in *Marrington's Case*. The law does not allow, where jurisdiction is conferred on two justices, the same case to be adjudicated upon by magistrates who hear part of the case one day from the witnesses, and learn the rest of the case from having the depositions read over to them. The magistrates must be present during the entire case, or they ought not to adjudicate in the matter. In a very recent case, *R. v. Watts* (a), it appeared that much irregularity had crept in, in taking the depositions of prisoners in the Magistrates Court at Liverpool; and a witness proved that the deposition in question was taken in accordance with the invariable and long established practice of that Court. But as it was shown that it had not been taken, as directed by the statute 11 and 12 Vic., c. 42, s. 17, in the presence of the magistrate as well as of the prisoner, it was objected on behalf of the prisoner that it was inadmissible. It was, however, admitted, and the prisoner convicted. But the Court of criminal appeal held that the deposition was bad on account of the irregularity, and quashed the conviction. No inconvenience to the justices can justify them in

(a) 88 L. J. M. C. 68.

disregarding the law. This case shows how much the administration of justice in our petty Courts would be benefitted by an acquaintance with the reports of the decisions of this Court; and prisoners like this man, of whose guilt there can be no doubt, would not then be so likely to escape the punishment they so richly deserve.

STEPHEN, C. J. I think that the justices should be advised to state by affidavit what they have to say in answer to applications of this kind.

Rule absolute.

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THOROLD *against* MILLER.

September 7.

ACTION on an agreement between the plaintiff and defendant, who was an attorney, that the former would serve the latter for one year, from April 1st, 1863, in the capacity of managing clerk, at the wages of £250 a year. The declaration alleged that he entered the service, &c., and so continued therein for a part of the year, until, &c., and was always ready and willing, &c. Breach, illegal dismissal.

Pleas 1—*non assumpsit*; 2—rescission before breach; 3—exoneration before breach; 4—improper, offensive, and disobedient conduct, and dismissal in consequence; 5—misconduct by wilful disobedience of defendant's reasonable orders, by habitual neglect of duties and failure to perform the same, by not paying over and applying monies of the defendant as by him directed, by representing himself a partner, &c. Issue thereon.

At the trial before *Wise*, J., the plaintiff's counsel stated that he should confine himself in the first instance to proof of the employment and dismissal, and reserve any evidence he might have with regard to the defendant's pleas of justification for the reply. A great deal of the plaintiff's evidence had been taken on commission; and one of these witnesses had been

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examined on both points. The plaintiff's counsel, therefore, asked the learned Judge to be allowed to omit the questions and answers in the examination of this witness on the second point, that is as to the justification, undertaking to put in the whole in reply to the defendant's evidence, if it were required.

After objection taken, the learned Judge allowed this course to be pursued, and portions of the examination-in-chief of this witness, and the whole of the cross-examination which related only to the first point, were then read at once, and a verdict was found for the plaintiff.

September 7. *Darvall*, Q. C., for the defendant, moved for a rule *nisi* for a new trial. The learned Judge acted erroneously, and the inconvenience this cause was calculated to prevent, might have been obviated by the plaintiff taking two examinations. The cross-examination must be to a great extent unintelligible, unless the whole of the examination-in-chief has been read. It is submitted that the presiding Judge has no power to split up the evidence in the way proposed; and that as he is unacquainted with the circumstances of the case, he cannot distinguish the one class of evidence from the other. The course pursued is an invasion of the established rules of practice, and the defendant is therefore entitled to a new trial.

STEPHEN, C. J. As to the excision or omission of some of the evidence of the witnesses examined *de bene esse*, I am of opinion that a Judge at *nisi prius* may, in his discretion, if the circumstances in his opinion so require, allow portions only of the evidence taken on commission to be read in the first instance—the entire of the evidence being open to the adverse party to be adduced eventually by him, if he shall think fit, as part of his own case. In this case the first question was, whether the plaintiff's hiring was weekly or for a year, and at what rate of salary? and the second question was whether the plaintiff had misconducted himself? The plaintiff examined his witnesses by commission on both points; and I think that the Judge was right in allow-

ing him to omit the questions and answers on the second point—the plaintiff undertaking to put in the whole in reply to the defendant's evidence, and the whole of the cross-examination which related only to the first point being read at once.

I think the course adopted was a proper course. The plaintiff puts a witness into the box and examines him as to the contract, and then stops. The plaintiff says, "I shall have to examine the witness again as to the ground on which the defendant relies in his plea. I shall ask leave to call him again by and bye." I think the plaintiff would be allowed to do this; and why should he not be allowed to do the same thing in effect if the examination be in writing? If the defendant could suggest that his cross-examination would be rendered unintelligible by such excision, the Judge, as a matter of discretion, might order the whole of the examination-in-chief to be read at first. It is entirely a matter for the exercise of the discretion of the Judge. But even if I had been of opinion that the course pursued was wrong—as the defendant cannot by any possibility have been prejudiced in the slightest degree—I should not have considered it a sufficient ground for granting a new trial.

MILFORD, J. Unless there be a particular rule of practice by which the evidence is to be brought forward at the trial, it is a matter for the discretion of the Judge. If the Judge had ruled that the plaintiff should read the whole of his evidence, but that he should not be precluded by doing so from giving evidence in reply, it would have come to the same thing.

WISE, J. I thought it was a case in which the discretion of the Judge might be properly exercised, and that I might withdraw from the jury for a time the evidence which the party undertook to put in afterwards.

Rule refused.

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September 24.

Ex parte AH TCHIN and others.

A proclamation prohibiting any alien from mining in any part of a gold-field therein specified is valid; and an alien, holding a Miner's Right that issued before the proclamation, is liable to a penalty under the 8th section of the Gold Field's Act, if he mines for gold in a place named in such proclamation, (*Wise, J., dissentiente*).

THIS was an application for a prohibition under the Colonial Justices Act, to restrain certain parties from further proceeding upon or in respect of a certain conviction under the Gold Fields Act (a).

It appeared that the applicants had been convicted of unlawfully mining for gold at Victoria Hill, at the Burragong, &c., "they being aliens and Chinese, and not being authorised, and not the holders of Miners' Rights authorising them to mine for gold, at the said Victoria Hill, the said Victoria Hill not being within the boundaries of such place as the Governor hath by proclamation in the *Government Gazette*, ordered and declared that aliens being Chinese may only mine for gold." They had been fined £5 each, or in default of payment to be imprisoned for two calendar months.

It was admitted that the land in question is beyond the land mentioned in the proclamation contained in the *Government Gazette* of 23rd August, 1864 (b).

The rule had been obtained on the ground that a Magistrate has no power under the 25 Vic., No. 4, s. 8 to fine an alien Chinese, who being then the holder of a Miners' Right, mines for gold on a proclaimed gold field, but beyond the limits specified in the proclamation.

Sir *W. Manning*, Q.C., moved to make the rule absolute. This conviction cannot be sustained. Under the 5th section, the holders of a Miners' Right can mine for gold "upon any Crown lands;" provided that the Executive, may, by proclamation, order and declare that "such Miners' Right shall authorise aliens described in such proclamation to mine for gold upon such gold fields

(a) 25 Vic., No. 4.

(b) That Proclamation ordered and declared—"That from and after the publication thereof, every Miners' Right granted to and held by a Chinese alien, shall authorise the person therein named to mine for gold on the different gold fields, at the places only which are named and specified in the schedule hereunto annexed, and not otherwise or elsewhere."

or at such places only as shall be named in such proclamation." It is submitted that the proclamation can confine such aliens to particular gold fields, or to particular places other than gold fields to be therein named ; but that this section does not authorise a proclamation authorising them to mine on portions only of a gold field, or confining them within certain limits being part of a gold field. [*Wise, J.* A holder of a Miners' Right can mine on any Crown lands, whether a gold field or not ; and an alien therefore being such holder can mine elsewhere besides on a gold field ; if therefore these latter words "at such places only, as shall be named in such proclamation," are confined to gold fields then there would appear to be no power to prevent them mining anywhere else except on a gold field.] There would seem to be two offences contemplated by the statute, one the mining without a Miners' Right, an offence common to British subjects and aliens ; and the other the mining beyond the places mentioned in a proclamation by an alien who possesses a Miners' Right ; an offence which can only be committed by "aliens described in such proclamation." The 8th section enacts that every alien, not being an authorised person, who shall mine for gold or become resident on any gold field without a Miners' Right as aforesaid, shall be liable, &c. It is submitted that this being a penal clause, must be strictly interpreted, and that the words, "the Miners' Right as aforesaid," must mean a general Miners' Right, and that the penalty can only be inflicted upon an alien who mines without any Miner's Right. The correctness of this construction is shown by reference to the second offence : for an alien having a Miners' Right can at all events reside on any gold field.

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The *Solicitor General* contra. The proviso of the 5th section introduces a limitation, and the proclamation specifies the places to which the proviso shall apply. The 8th section is badly drawn, but it is clear that the words "every alien not being an authorised person," mean every alien with a limited authority. [*Wise, J.*

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"Authorised persons" are defined in the interpretation clause.] It is submitted that these words in the 8th section are to be taken in their ordinary signification, and as explained by the 5th section. The section also is limited to aliens.

Sir *W. Manning* replied.

STEPHEN, C. J. This act is framed very loosely, and in defiance of all rules of grammar; but it is our duty if possible to discover the intention of the legislature from the language used, and on the whole I am of opinion that they have used words from which we can gather their intention, that an alien should not dig for gold except on some spot exclusively set apart for that purpose. The 5th section says that the Governor shall declare by proclamation that such Miners' Right shall authorise aliens described in such proclamation to mine for gold upon such gold fields, or at such places only as shall be named in such proclamation. The Governor has made such a proclamation, declaring that a Miners' Right held by a Chinese alien, shall authorise such holder to mine for gold only at places specified in the schedule thereunto annexed. It being conceded that these applicants are Chinese aliens, and that they have dug in a place not specified in the schedule to the proclamation, I am of opinion that the legislature meant that they should be punished. They obtained a license at a time when they could roam all over the gold fields, but afterwards the Governor restrained their rights to particular places. The law allows that to be done and we cannot prevent the law being carried out, and therefore the Chinese having done that which the legislature intended that they should not do, are liable to the penalty.

On the whole I think that the conviction must be sustained. It seems to me that each of the applicants held a Miners' Right, but not a Miners' Right "as aforesaid," within the meaning of the 8th section. The words of the statute mean that a Miner's Right in the hands of a European gives a right to mine over all the gold fields, but in the hands of a Chinese alien it gives a right to

mine only on a prescribed and limited portion of that gold field. The applicants are not "authorised persons" within the meaning of the interpretation clause, and they are not authorised persons for digging, except on that prescribed portion.

MILFORD, J., concurred.

WISE, J. I am unable to concur in the judgments just delivered. The effect of these judgments is that the Government may receive any sum, however large, for Miners' Rights from aliens—that is, from persons not British subjects on the 1st of January—and having for this consideration given them a power to mine for gold for a whole year, may the next day deprive them of that right and yet retain their money, and that this has been enacted by Parliament. I am unable to decide that such a solecism in legislation has been committed, unless the words are so clear as to compel me to come to such a conclusion. But the language is full of difficulties. The first doubt I have is as to the 5th section. The proviso of that section seems to me to refer to Miners' Rights to be afterwards issued, and therefore the Government had no power to deprive a person of a right which he had already obtained before the issuing of the proclamation. The Miners' Rights are in terms "to be in force until 31st December, 1864," and it seems to me that it would require clear words to show that the Legislature intended that the Governor should have power to issue an *ex post facto* proclamation limiting a right already acquired and paid for. It is also open to considerable doubt whether the 5th section gives any power to do more than define the gold fields or places at which aliens may mine. By the "interpretation" clause, gold fields mean "those parts of the Crown lands of New South Wales which may be proclaimed as Gold Fields in the *Gazette*;" and the ordinary construction of the word place would seem to be, rather a place other than a proclaimed gold field, and not a part of a gold field. If this be so, then the present proclamation would be void. But assuming that the Governor has power to issue a proclamation limiting aliens

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to a part of a particular gold field, the question is whether the present applicants are liable to a penalty under the 8th section, they having received a Miners' Right for a year. It seems to me that the words "not being an authorized person" must mean as defined in the interpretation clause, and it is admitted that the applicants were not one of these classes. What is the meaning of without a Miner's Right? The words without a Miner's Right apply to both preceding subjects, "shall mine for gold," or "become resident." Now there is nothing in the statute which authorises a proclamation to prevent aliens residing on a gold field, whether with or without a Miner's Right. The 5th section only applies to occupying land, not to mere residence. Then the 8th section makes it penal for an alien to reside on a gold field without a Miner's Right. But if an alien has a Miner's Right, he could not be rendered liable to a penalty for residing on any part of a gold field, whether included or not in a proclamation issued under the 5th section. It would be contrary to all principle to apply an enactment so as to deprive a person of a vested right, without the clearest possible words showing that it was the intention of the Legislature to do what, speaking generally, must inflict injustice. But the natural construction of the proviso in the 5th section is, that such proclamation is to apply only to Miners' Rights to be issued afterwards. The meaning then would be that any alien mining on a gold field or part of a gold field to which his Miners' Right when granted does not extend, will be liable to a penalty; or if he becomes resident on any gold field without a Miners' Right at all, he will also be liable.

It must also be remembered that this part of the statute extends not merely to Chinese, but to any persons both of whose parents were not British, who happen to be born in China or its dependencies, or any island in the Chinese seas.

Rule discharged.

GROGAN *against* SLAPP.

September 7.

This was an issue sent down to be tried at the Metropolitan District Court under the 98th section of the District Court Act.

The first count was in debt for two quarters' rent due under a lease by the plaintiff to the defendant of certain premises for three years from 1st July, 1862, at £70 a year, payable quarterly. There was a second count for use and occupation.

Plea to the first count that during the term and before any part of the rent became due, the plaintiff, without the consent and against the will of the defendant, wrongfully entered into and upon the demised premises, and then evicted the defendant from the possession of part thereof, that is to say, from a portion of a certain paddock belonging to and being part of the demised premises, and the plaintiff kept and continued the defendant so evicted and expelled thenceforth hitherto. To the second count, never indebted. Issue thereon.

At the trial it appeared that the plaintiff had since the lease, and before the rent for the first quarter became due, tortiously evicted the defendant from a small portion of the demised premises. But the jury found a verdict for the plaintiff on the first count, by way of apportionment, for £34 15s.; and a shilling on the second count.

Innes, for the defendant obtained a rule *nisi* for a new trial, or to enter a nonsuit, or a verdict for the defendant, on the ground that according to law, upon the facts proved and admitted at the trial, the verdict should have been so entered.

Isaacs showed cause. The tenant is at all events liable for the use and occupation of the premises. The continuing to occupy renders him liable to pay the rent. In

Action of debt for two quarters rent, due under a lease; second count, for use and occupation. The plaintiff (the lessor) had since the lease evicted the defendant (the lessee) from a portion of the demised premises before the first quarter's rent became due, but the latter had remained in possession of the residue. Held that the plaintiff could not recover under either count.

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the notes to *Salmon v. Smith* (a) it is laid down that "it seems clear that the lessor might, in an action for use and occupation, recover on a *quantum meruit* a reasonable compensation from the lessee in respect of the part of the demised premises actually occupied by him;" *Tomlinson v. Day* (b). And *Stokes v. Cooper* (c) is an authority that if the tenant, after the eviction, continue in possession of the residue, he is liable for that portion.

Innes contra. As there was an actual demise, use and occupation will not lie; *Hall v. Burgess* (d). The eviction by a landlord of his tenant from a part of the premises occasions a suspension of the entire rent during its continuance; but the tenancy is not put an end to, nor is the tenant discharged from the performance of the covenants other than those which provide for the payment of the rent; *Morrison v. Chadwick* (e). Therefore, there being this eviction, not by title paramount, but by the tortious act of the landlord, the defendant is wholly excused, *Neale v. Mackenzie* (f)—and the rent of the whole is suspended, although he continues in possession of the remainder. The authority of *Stokes v. Cooper* is questioned by *Parke B.* in *Reeve v. Bird* (g). He also referred to *Upton v. Townend* (h).

STEPHEN, C. J. I am of opinion that the plaintiff is not entitled to recover any of the rent in this case. The plaintiff, who is the landlord, has evicted the defendant from a portion of the demised premises; and as he has been guilty of this tortious act, he cannot recover. If the eviction had been by some third person, by title paramount, there might have been an apportionment of the rent. And as the plaintiff cannot recover for the rent under the contract, so he cannot recover as for use and occupation, for that would be in effect to apportion the rent, which cannot be done without the assent of both

(a) 1 Wms. Saunds. 204 d.
 (b) 2 B. & B. 680. (c) 3 Camp. 514.
 (d) 5 B. & C. 333. (e) 7 C. B. 283; 18 L. J. C. P. 189.
 (f) 1 M. & W. 758; 2 C. M. & R. 84. (g) 1 C. M. & R. 36.
 (h) 17 C. B. 57; 25 L. J. C. P. 44.

parties (a). *Hall v. Burgess* (b) is an authority that where there is a demise the landlord will not be entitled to maintain an action for use and occupation, unless an action can be maintained on the demise itself.

MILFORD, J. The law is perfectly clear that where a landlord evicts his tenant from a portion of the demised premises he cannot sue on the lease for the rent ; and if he cannot sue for the rent, according to the judgment of *Holroyd*, J., in *Hall v. Burgess*, he cannot sue for use and occupation.

WISE, J. There is a clear distinction between eviction by title paramount and eviction by the tortious act of the landlord. In *Stevenson v. Lambard* (c), it was held that in the case of eviction by title paramount, the rent could be apportioned in an action of covenant against the assignee of the lessee. *Stokes v. Cooper* must have been a case either of eviction by title paramount, or else that decision is not law. Good sense is in favor of the doctrine that a tortious entry upon any part of land demised is a suspension of the whole rent until the lessee be restored to possession, as laid down in *Gilbert on Rents* (d).

Rule absolute for a new trial.

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(a) See *Boodle v. Campbell*, 7 M. & G. 395. (b) 5 B. & C. 333.
(c) 2 East 579. (d) p. 178.

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September 14.

The ATTORNEY GENERAL *against* EAGAR.

The Crown, in 1826, erected a corporate body in the colony, by letters patent, with the object of making provision "for the maintenance of religion and the

education of youth" in the colony. There was also a clause enabling the Crown to dissolve the corporation, in which event it was declared that all the lands granted should revert to and be absolutely vested in the Crown, subject to all existing contracts, in respect thereof to be "held, applied, and disposed of in such manner as shall appear to us, our heirs and successors, most conducive to the maintenance and promotion of religion, and the education of the youth of the said colony." In 1829, and afterwards, certain grants were issued to the corporation, which were declared in terms to be for the purpose of "making provision for the maintenance and promotion of religion, and the education of the youth in the said colony," and it was declared in the grants that they were "subject in all respects to the provisions, declarations, and regulations contained in the letters patent," and that the land shall be "subject also to the rules, declarations, ordinances, provisoies, and directions contained in the letters patent, relative to the powers thereby given to the corporation." *Held* that upon the dissolution of the corporation in 1833, the lands granted to it reverted to the Crown, in trust for the maintenance and promotion of religion and the education of the youth in the colony.

Held also that it was a trust for a religious or charitable purpose, and not void for uncertainty.

By the 5 and 6 Vic., c. 36, the "waste lands of the Crown" were to be conveyed or alienated only in the manner and subject to the regulations prescribed by that statute. By sect. 3, lands required for certain specified public purposes are excepted from the operation of the Act; and sect. 20 reserves all existing promises and engagements made by or on behalf of Her Majesty, with respect to lands in the colony. By sect. 23, waste lands are defined to be "any lands which are or shall be vested in Her Majesty, &c., and which have not been already granted, or lawfully contracted to be granted, to any person, &c., or which have not been dedicated or set apart for some public use." *Held*, that lands so granted to the corporation did revert and become vested in the Crown upon its dissolution, but did not become waste lands within the meaning of the Act.

By the 18 and 19 Vic., c. 54, sect. 2, the disposal of waste lands of the Crown was vested in the colonial legislature, subject however to the proviso that nothing in the statute contained "should affect any contract, or prevent the fulfilment of any promise or engagement by the Crown with respect to any lands." *Held*, that lands upon which a trust has fastened, are not affected by the statute.

By the New South Wales Constitution Act of 1853, sect. 47, all territorial, casual, and other revenues of the Crown (including royalties), from whatever source, arising within the colony, are made part of the consolidated revenue fund. By sect. 50, the civil list is declared to be granted in lieu of all territorial, casual, and other revenues of the Crown, to the disposal of which the Crown may be entitled, absolutely, conditionally, or otherwise. By sect. 58, the management of the waste lands of the Crown, and the appropriation of the proceeds, are vested in the colonial legislature, provided that nothing therein contained shall affect any promise or engagement of the Crown in respect of such lands. *Held*, that the proceeds of the church and school lands do not form part of the consolidated revenue.

to clergymen of the Church of England, the Roman Catholic Church, the Presbyterian Church of Scotland, and the Wesleyan Methodist Church in this colony, out of certain moneys which had been received by the said *Geoffrey Eagar* as such Colonial Treasurer, as and for the rent of certain lands situate in the said colony, and which had been duly granted by the Crown to, and were formerly vested in, a certain body corporate and aggregate, incorporated under the name of "The Trustees of the Clergy and School Lands in New South Wales," and by consent of the parties, and by order of his Honor Mr. Justice *Milford*, dated the 24th of August, 1864, according to the Common Law Procedure Act, of 1859, the following case has been stated for the opinion of the Court without any pleadings.

The facts upon which the claim is made by the Attorney General in this action are as follows:—

By letters patent or charter of incorporation, bearing date the 9th March, 1826, reciting his Majesty had taken into his royal consideration the necessity of making provision for the maintenance of religion and the education of youth in the colony of New South Wales, Lieutenant-General *Ralph Darling*, Commander-in-chief in and over the colony of New South Wales and its dependencies, and the Governor or Acting-governor for the time being of the said colony; *Francis Forbes*, Esquire, Chief Justice of the Supreme Court of the said colony, or the Chief Justice of the said Court for the time being; the several members of the Legislative Council of the said colony for the time being; the reverend and venerable *Thomas Hobbes Scott*, archdeacon of New South Wales, or the archdeacon of New South Wales for the time being; *Alexander Macleay*, Esquire, the Secretary of the said colony, or the Secretary for the time being of the said colony; *Saxe Bannister*, Esquire, Attorney General of the said colony, or the Attorney General thereof for the time being; *John Stephen*, Esquire, Solicitor General for the said colony, or the Solicitor General thereof for the time being; and the nine senior chaplains or assistant chaplains appointed or to be ap-

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pointed to officiate and perform divine service according to the rites and ceremonies of the Church of England in the said colony; and their successors are thereby declared to be, and to be thereby united into a company and declared to be a body politic and corporate, with perpetual succession, by the name of the Trustees of the Clergy and School Lands in the colony of New South Wales, by that name to sue, plead, and be impleaded, and by that name authorised and empowered to purchase, take, acquire, hold, and alienate lands and hereditaments within the said colony.

The charter also gives and grants to the said company power to have a common seal, and such seal, from time to time, to break, change, and alter, as there may be occasion.

Requires corporation to hold courts or meetings upon certain days therein specified, fixes the mode in which the business of the corporation shall be conducted, empowers the corporation to provide for the management, cultivation, and improvement of such lands as shall be granted to them by the Crown, to grant leases thereof for any term of years not exceeding thirty-two years, or the duration of two lives in being at the time of the demise, declares that the rent of such lands shall be payable to the public Treasurer of the said colony, empowers the corporation to raise money by mortgage for the improvement and cultivation of the lands, and directs and ordains that the treasurer of the corporation shall, at the general court of the corporation, to be held in the month of February in each year, lay before the said corporation an account in writing of all the sums of money paid, laid out, and expended by him, or by his order, from the first of January to the thirty-first day of December.

Directs and ordains that the nett balance which may appear in such account, after payment of salaries and expenses, shall be divided and apportioned into two equal parts and carried to the credit of two accounts, one to be called the improvement and building account, the other the clergy and school account; that the money standing

to the credit of the improvement and building account is directed to be applied by the corporation in making roads, drains, or sewers, the erection and repair of churches, parsonages, and school-houses, in the erection and repair of farms, houses, and buildings, and the permanent improvement of the corporation lands ; and that the money from time to time remaining to the credit of the clergy and school account shall, by the said corporation, be applied and expended in and towards the maintenance and support of the clergy of the Established Church of England in the said colony, and the maintenance and support of schools and schoolmasters, according to the rules and subject to the conditions thereafter in that behalf prescribed.

That that part of the moneys which is directed to be applied for the support of the clergy shall be so applied —1st, in payment of such stipends as may be granted by the Crown to any bishop or bishops, archdeacon or archdeacons, within the said colony ; and, 2ndly, in payment of such stipends as may be granted in like manner to the chaplains or clergy of the said colony—and that that part of the moneys which is directed to be applied towards the support and maintenance of schools and schoolmasters, shall be applied in and towards the maintenance of schools and schoolmasters in any parish in the said colony in connection with the Established Church, and under and subject to the visitation and control of the bishop, or in his absence, the archdeacon for the time being of the said colony—and that such schools shall be subject to the order, direction, superintendence, and control of the clergyman or minister for the time being officiating in the Church of and belonging to the parish in which any such school may be established.

And also declares that all lands set apart for the maintenance and education of orphans and such part of the revenue of the colony as had been, or might be, set apart for the education of youth therein, are vested in and placed under the management of the corporation, to be by them applied and disposed of in aid of the funds aforesaid, in and towards the education of youth in

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the said colony in the principles of the Established Church.

The dissolution of the corporation is provided for in the charter, in the following words (a) :—

“ And we do further will and ordain that it shall be lawful for us, our heirs and successors, by any order to be issued by us for that purpose, with the advice of our or their Privy Council, to dissolve and put an end to the said corporation in case it shall appear to us, our heirs and successors, with the advice aforesaid, expedient so to do, and thereupon all the lands which may by us, our heirs and successors, be granted to the said corporation, shall revert and become absolutely vested in us or them, subject to all mortgages and contracts for the sale thereof, lawfully made by the said corporation, to be held, applied, and disposed of in such manner as to us, our heirs and successors, shall appear most conducive to the maintenance and promotion of religion and the education of youth in the said colony.”

Grants of lands were afterwards made by the Crown in the usual form to the corporation, in its corporate name, as the Trustees of the Clergy and School lands in the colony of New South Wales, their successors and assigns, for the purpose of making provision for the maintenance and promotion of religion and the education of youth in the said colony, but subject in all respects to the provisions, declarations, and regulations contained in the letters patent of the 9th March, 1826.

The corporation continued to hold and manage the lands so granted to them or vested in them, by virtue of the letters patent, until it was dissolved by an order in Council of his late Majesty King William the Fourth, which is in the words following, that is to say :—

“ At the Court of St. James, the fourth day of February, in the year one thousand eight hundred and thirty-three.

Present—the King’s most excellent Majesty in Council.

Whereas, his late Majesty King George the Fourth, did by certain letters patent, under the great seal of the

(a) By sect. 36.

United Kingdom, bearing date the sixteenth day of July, in the year one thousand eight hundred and twenty-five, constitute and appoint *Ralph Darling*, Esq., Lieutenant-General of his said late Majesty's forces, the Captain-General and Governor-in-chief in and over his territory of New South Wales and its dependencies, and, whereas, by certain additional instructions, under his late Majesty's signet and sign manual, accompanying and referred to in the said commission, his said late Majesty did require and command the said *Ralph Darling* to affix the public seal of the colony to certain letters patent for erecting therein a certain corporation, by the name of the trustees of the clergy and school lands, in the colony of New South Wales, in such manner and form as in and by the said additional instructions is in that behalf provided and set forth. And, whereas, in pursuance of the said additional instructions, the said *Ralph Darling* did, on the 9th day of March, in the year one thousand eight hundred and twenty-six, issue under the public seal of the said colony certain letters patent constituting and erecting the said corporation—and it was thereby and amongst other things provided, and his late Majesty did thereby declare it to be his will, and did ordain that it should be lawful for his said late Majesty, his heirs and successors, by any order to be issued by him or them for that purpose, with the advice of his or their Privy Council, to dissolve and put an end to the said corporation, in case it should appear to his said late Majesty, his heirs or successors, with the advice aforesaid, expedient so to do. And, whereas, it doth appear to his Majesty, with the advice of his Privy Council, expedient to dissolve and put an end to the said corporation. Now, therefore, his Majesty doth with, and by the advice aforesaid, hereby dissolve and put an end to the said corporation, and the same is by this present order dissolved accordingly, and the Right Honorable Viscount *Goderich*, one of his Majesty's principal Secretaries of State, is to give the necessary directions therein.

(Signed) *C. Greville.*"

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Since the dissolution of the corporation the annual income arising from the lands granted to, or otherwise vested in it, have been received by the Colonial Treasurer for the time being of the said colony, and have from time to time been applied under instructions from the Secretary of State for the colonies amongst ministers of the Church of England, of the Roman Catholic Church, the Presbyterian Church of Scotland, and of the Wesleyan Methodists.

In pursuance of such instructions, four several sums, amounting in the whole to the sum of £3,419 0s. 4d., have been paid by the said *Geoffrey Eagar*, out of the moneys received by him from lands formerly vested in the said corporation to clergymen of the Church of England, the Roman Catholic Church, the Presbyterian Church of Scotland, and the Wesleyan Methodist Church in this colony.

The Attorney General, however, asserts that the land formerly belonging to the corporation upon its dissolution became waste lands of the Crown, and that all rent or other moneys received therefrom form portion of the consolidated revenue of the Crown in the said colony, and cannot lawfully be appropriated otherwise than in pursuance of an Act of the Governor and Council of the said colony—and that the said *Geoffrey Eagar*, having paid the said sum of £3,419 0s. 4d., without the payment thereof being authorised by an Act of Council, is liable to refund the same.

The said *Geoffrey Eagar* waives any defence to the claim made in this action by reason of the said payment having been made by him as a minister of the Crown.

Since the payment of the said sum of £3,419 0s. 4d. to the ministers of the said four religious bodies or denominations as aforesaid, further sums have been received by the said *Geoffrey Eagar* as such Colonial Treasurer, on account of the said lands, and the same are claimed by the heads of the said denominations for the use and benefit of the said ministers, as being received and held in trust for them or some of them. And all future receipts on account of the said lands are claimed by them

in like manner; the said *Geoffrey Eagar* being indifferent between the Attorney General and the said other claimants, has consented that the last-mentioned claimants be heard in his name on the argument of this case, if they shall think fit, as claiming to be *cestui que trusts* of the proceeds of the said lands.

The parties hereto have agreed for the purpose of determining the matter at issue between them upon the facts as above stated, that the following shall be the questions for the consideration and determination of the Court, that is to say—

1. Whether, upon the dissolution of the corporation of the trustees of the clergy and school lands in the colony of New South Wales, the lands granted to or otherwise vested in the corporation reverted to and became waste lands of the Crown in the said colony?

2. Whether, upon the dissolution of the said corporation, the lands so granted or vested reverted to the Crown upon trust to be applied and disposed of in such manner as to his Majesty and to his heirs and successors should appear most conducive to the maintenance and promotion of religion and the education of youth in the said colony?

3. Whether the sum of £3,419 0s. 4d. formed a portion of the consolidated revenue of the said colony, or was held by the Crown in trust?

And the parties hereto declare that this honorable Court shall be at liberty to direct a verdict to be entered herein for said plaintiff or defendant in respect of the said sum of £3,419 0s. 4d., and that this case be stated reserving the right of either party to appeal if so advised."

Letters patent were issued on the 1st of January, 1831, appointing five commissioners for the management and performance of the several duties vested in the corporation by the charter.

The following was given as the form of grants of lands to the trustees:—

"Whereas by his Majesty the King's instructions, under the royal sign manual, bearing date the seven-

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teenth day of July, in the year of our Lord one thousand eight hundred and twenty-five, I, the said *Ralph Darling*, am fully authorised, empowered, and directed, when and so soon as a certain corporation then about to be created 'for the establishment and support within the said colony of New South Wales of the Protestant Reformed Religion, as by law established in England and Ireland, and for the education of youth in the discipline, and according to the principles of the United Church of England and Ireland,' should be established, to give and grant, under the public seal of New South Wales aforesaid, to the said corporation certain lands within the said colony: And whereas by letters patent, dated the ninth day of March, in the year of our Lord one thousand eight hundred and twenty-six, his said Majesty was pleased to create and appoint a corporation within the said colony of New South Wales, under the name and title of 'The Trustees of the Clergy and School Lands in the colony of New South Wales.' Now, therefore, know ye, that I, the said *Ralph Darling*, in pursuance of the power and authority given and granted to me in and by his Majesty's said instructions, do hereby grant unto the trustees of the clergy and school lands in the said colony of New South Wales, their successors and assigns, for the purpose of making provision for the maintenance and promotion of religion and education of the youth in the said colony, but subject in all respects to the provisions, declarations, and regulations contained in the said letters patent of the ninth day of March, one thousand eight hundred and twenty-six—and also subject to the laws and municipal regulations that may now or hereafter apply to the colony at large, or to the parish, district, or county in which the said land is situated—all that, &c. (here the parcels are set out) to have and to hold the said piece or parcel of land with its appurtenances unto the said trustees of the clergy and school lands, and their successors and assigns for ever, subject to the payment of an annual quit rent to his said Majesty, his heirs and successors, &c.

And the grant contains also a proviso—"that the

said piece or parcel of land hereinbefore described, shall be subject as aforesaid to all laws and municipal regulations that may now or hereafter be in force and apply to the said colony at large, or to the parish, district, or county, or any of them, in which the said land is situated ; and also subject to the rules, declarations, ordinances, provisoies, and directions contained in the said letters patent creating the aforesaid corporation, relative to the powers thereby given and granted to the said trustees and their successors.”

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The *Attorney General*. Two propositions are contended for by the plaintiff. The first, that the lands in question are still waste lands of the Crown ; and, secondly, that even if they are not, they are subject to no conditions cognisable in a Court of law or equity. As to the opinions of the law officers in England (a), they proceed on the assumption of a fact which does not exist. The charter of 1826 is no grant, and contains no grant of land. There is nothing in it which dedicates any land in this colony to any purpose. It only creates a corporation, with power to dissolve it under sect. 36 ; and on such dissolution the lands shall “revert and vest in the Crown,” for education and religion generally. But, afterwards, certain grants issued. In February, 1829, Governor *Darling* granted certain land to the corporation, and sundry other grants have subsequently been issued from time to time on the same terms. These grants were made to the trustees of the clergy and school lands, as they state, “for the purpose of making provision for the maintenance and promotion of religion and education of the youth in the said colony, but subject in all respects to the provisions, &c.,” contained in the letters patent. If there were any trust at all, it was clearly for the Church of England exclusively, and members of that denomination alone. Although, therefore, under sect. 36, the Crown could terminate the existence of the corporation, yet as nothing but an act of parliament can make land go other than as the owner of

(a) See note A, No. 10, at the end of this case.

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the land determines, the charter has not power to create a new trust, or to vest land otherwise than according to the terms of the original grants, for a Crown charter is not equivalent to a statute; and on the dissolution of the corporation, the lands reverted to the Crown freed from the trust. The charter, which issued before the grants, could not lay down rules for the disposition of the land, otherwise than according to the terms of the grant. The land was held by the corporation, by virtue of the grants alone; and as the grantee has ceased to exist, and has no successors, the land granted is vested in the Crown, just as it would do, in the case of an ordinary person. The grants being thus gone, the land has reverted to the Crown and become waste lands. The 5 and 6 Vic., c. 36, sect. 28, defines waste lands—and the church and school lands are not within the exceptions to that clause, not having been "dedicated or set apart to some public use." In order to show any such dedication, it would be necessary to show some grant, proclamation, or declaration by the Crown, appropriating the land to such purpose. The 18 and 19 Vic., c. 54, sect. 2, vests the entire control of the waste lands of the Crown in the colonial legislature; and our own Act (a), ss. 50 and 58, is to the same effect or more emphatically. The term waste lands, as used in these two statutes, is not limited by the definition in the 5 and 6 Vic., c. 36, but includes all lands in the colony, not being the property of private persons, and not having been appropriated by grant to any particular person or any particular purpose. But the 5 W. IV., No. 11, sect. 1 (b), is an express

(a) 17 Vic., No. 41—schedule (1) to 18 and 19 Vic., c. 54.

(b) This section, after reciting the dissolution of the corporation, and that thereupon all the lands vested in the said corporation reverted and became absolutely vested in his Majesty, subject to all mortgages and contracts for the sale thereof, lawfully made by the said corporation, enacts that "all and every deed or deeds of mortgage, executed by any person or persons to the late corporation of the trustees of the clergy and school lands, and all sums of money thereby secured to be paid respectively, and all the lands in such deed or deeds of mortgage respectively mentioned, and all rents or arrears of rent due and owing to the said corporation, under and by virtue of any lease or leases granted or agreed to be granted by the said corporation, and all debts due to the said corporation, and all stock of cattle, sheep, or any other property of any kind or description soever, which belonged to the said corporation at the time of

parliamentary declaration that the lands were then the property of the Crown. Nothing whatever is said as to the existence of any trust, and therefore it is clear that they were then considered, and still are the waste lands of the Crown. The agent to be appointed under sect. 2 was not to manage them as a separate property of the Crown, but to deal as the bailiff of the Crown, with lands acquired from other persons, and lands mortgaged to the corporation, over which the corporation, as it no longer existed, could not exercise any control.

But even if otherwise, there is no valid, no enforceable or cognisable trust. It is purely a voluntary grant and without any consideration moving from the grantee, and therefore not enforceable in equity (a). The grants are all for the Church of England, and no subsequent grant has altered or has re-declared that trust. There is no conveyance which gives to any person any right whatever to these lands. [*Milford*, J. If originally there was a complete grant, the trusts will not fail for want of a trustee.] The lands are revested in the Crown, and this has been recognised by several statutes. [*Wise*, J. Could the legislature of this colony deprive the Crown of its land? *Stephen*, C. J. If the legislation was not disallowed by the Crown, it might be taken that it was assented to.] There has been no sufficient transfer, conveyance, or declaration to vest any estate in trust in favor of mere volunteers, of which a Court of equity would take notice; *Colman v. Sarrel* (b), *Pulvertoft v. Pulvertoft* (c), *Fortescue v. Barnett* (d).

The charter of incorporation, which was prior to the grant, could not effectually declare any trust, and especially as there was no consideration moving from the grantee, and amounts at the most to a promise purely voluntary. Any despatches of the Secretary of State will not bind, and can have no efficacy—and, at all events,

its dissolution, became and were thereupon vested in his Majesty, in right of his Crown of England, and are now vested in his Majesty, his heirs and successors."

(a) *Story E. J.*, s. 973.
(c) 18 *Ves.* 84.

(b) 1 *Ves.* 54.
(d) 3 *M. & K.* 36.

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are of no higher value than the charter of incorporation. Assuming, however, that the Crown, after having given the lands to the corporation for a particular purpose, and after the dissolution of the corporation and the revesting of the lands, had expressed its willingness to hold these lands for the purposes of education and religion, this would only be a voluntary promise, and would not amount to a declaration of trust. And if a trust existed at all, it would be for the benefit of the Church of England, and for worship and education according to its tenets. The intention of the donor at the time of the gift must be ascertained by finding out in what sense the words used in the deed of gift were then understood; and extrinsic evidence of contemporaneous documents and usage, the acts of the party, and the circumstances in which he was then placed, is admissible to ascertain this fact; *Drummond v. The Attorney General* (a), *Shore v. Wilson* (b). In construing this charter, therefore, the Court must remember when the alleged trust was created, and the position and probable intentions of the donor, and look at the then ideas, opinions, and usages. At that time, that is in 1826, no other Church was recognised as meriting state support than the Church of England. The donor here (the king of England) was the head of that Church, and his presumed object must have been to have aided the propagation of its doctrines. At this time any grant in aid of the Roman Catholic religion would have been illegal as a grant in aid of superstitious uses; *De Themmines v. De Bonneval* (c). The Crown has rights as extensive as those of an individual; and, therefore, why should a promise which is voluntary be enforced against the Crown which could not be enforced against an individual?

Sir *W. Manning*, Q. C., for the Roman Catholic body, appeared first by virtue of his precedence at the bar. When the charter issued the Crown could do as it pleased, for it held the lands absolutely by settlement and not by

(a) 2 H. L. C. 857.

(b) 9 Cl. & F. 356, 580, 511.

(c) 5 Russ. 288.

conquest. In 1842, its right to deal with them was first fettered by legislative control, by the 5 and 6 Vic., c. 36. The law does not require the same consideration between the Crown and a subject, as between subject and subject; but it is enough if the grant be beneficial to a subject. The very object of the religious education of the youth of the colony was a sufficient consideration for the Crown. [Stephen, C. J. But the trust contains a completed conveyance in trust; is not that enough, though there be no consideration?] The Crown having the absolute control over these lands had reserved to itself a power to withdraw them from the Church of England, and dedicate them on more general trusts. The Crown can, in a colony, grant lands for any religion. In India the Crown might grant lands in aid of the Mohametan religion [Stephen, C. J. The Christian religion is part of the common law of England]; or in the Mauritius or any other colony, where the bulk of its subjects are Roman Catholics, in aid of that religion. These were measures of general policy, which there is nothing either by the common law or by statute to control. This colony was settled from all parts of the empire without reference to the religion of the settlers; and there was no reason why—at the time in question, that is 1826—grants should not have been made in trust for the Roman Catholics. The Church of England, although established by law in England and Ireland, is not established even in Scotland, much less in the colonies. In the interval between the creation of the charter and its dissolution, the disabilities of the Roman Catholics had been removed. [Stephen, C. J. In 1828 there was passed the Repeal of the Corporation and Test Acts, 9 G. IV., c. 19, and in 1829 the Roman Catholic Relief Act, 10 G. IV., c. 7.] But assuming that the Crown could only give land in trust for the Church of England, the charter was consistent with itself and a trust still exists, and the verdict must be for the defendant. The Crown holds these lands under its own limitation, and, therefore, still on the trust which it has declared. At the time of the dissolution of the corporation, the lands

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it had held were no longer vested in the Crown *jure coronæ*. They had been granted for certain purposes, and had reverted to the Crown as if by escheat ; and after the escheat to the Crown, the latter might modify the original trust, and apply the land to the promotion of religion and education in a more general manner. But it is submitted that throughout the trust has been substantially the same, that is for education and religion. The Crown could not recall its gift. The *cestui que trusts* still subsist, and the grant has been made for their benefit. The lands have been granted within the meaning of sect. 23 of the Waste Lands Act, 5 and 6 Vic., c. 36, and therefore cannot be dealt with as waste lands. When the Crown relinquished the control over the waste lands to the colonial legislature, certain lands were exempted, and these lands are within this exemption. All the despatches—indeed the whole course of proceeding for the last thirty years—showed the intention to create a trust, and the Constitution Act does not interfere with its fulfilment. In the same session, and on the same day on which the 5 W. IV., No. 11 was passed, there was passed another Act for regulating or managing the Crown, that is, the Waste Lands, properly so called, namely, the 5 W. IV., No. 12 ; so that the legislature has marked a difference between the latter and the church and school lands. The Crown could not have intended to surrender these lands thus held on trust in consideration of a personal advantage in the shape of a civil list, under the 18 and 19 Vic., c. 54. If there be a trust, the Court must assume that the Crown will perform it, so that the question of power to compel need not be considered. But if the Colonial Treasurer did not deal with the monies according to the trust, it is submitted that he could be compelled to do so by mandamus.

Darvall, Q. C., for the Church of England. The 86th section is prospective, and shows an intention of perpetuating the trust, but with power to change the application of the fund as might be considered expedient. The 21st section makes provision in the case of for-

feiture by the misconduct of trustees. At this time no land had been granted, and therefore the section must have contemplated forfeiture when land should be held on trust. The Crown could create a trust, and yet reserve a right to resume the land and impose other trusts. The object was education and religion ; and the mode, that is, by the Church of England, was subordinate. The grant was made subject to the provisions of the charter of incorporation, and of course, therefore, among them the provision respecting the revocation and then reverting on a similar trust. After the dissolution of the corporation, and the reverting of these lands, they had been expressly dedicated for the purposes of religion and education. He referred to *Lewin* on Trusts (a).

Gordon for the Wesleyan body. There is no doubt as to the power of the Crown to create a trust in favor of the religious bodies generally ; and Sir *W. Follett* has given his opinion to that effect (b). The Waste Lands Act (c) first limited the absolute control of the Crown over the lands of the colony. But the 20th section provides that nothing contained in that Act shall affect any contract, promise, or engagement made by the Crown ; and the 23rd section exempts from the operation of the Act all lands dedicated or set apart for some public use. If, therefore, the lands in question have been so dedicated or set apart, or have been the subject of any agreement by the Crown, they are not waste lands within the meaning of that Act. The 50th section of the Constitution Act (d) has nothing to do with the matter—for that section only refers to land from which there was a revenue accruing to the Crown ; but this trust fund was no revenue of the Crown. The recital in the 5 W. IV., No. 11, must be read in connection with the charter of incorporation, and the fact of the dissolution of the corporation, and also in connection with the 7 G. IV., No. 4. When the Waste Lands Act was passed, the lands were divided into classes ; one under the manage-

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(a) pp. 30, 224, and 674.
(b) See note A, No. 2. (c) 5 & 6 Vic., c. 36.
(d) 17 Vic., No. 41—schedule (1) to 18 & 19 Vic., c. 54.

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ment of a commissioner with the powers of a bailiff, appointed under the 5 W. IV., No. 12 (a); and the other, being the church and school lands, under the management of an agent appointed under the 5 W. IV., No. 11; both acts being passed on the same day. By dealing with these lands thus separately, the legislature recognised the existence of the trust. Under the charter, three classes of land were vested in the corporation; land already appropriated for the maintenance and education of orphans (s. 32); lands set apart for the support of the clergy (s. 33), which it not only declares but grants; and lands which should hereafter be granted under the provisions of the sign manual. The lands already granted were transferred to the corporation, subject to existing rights; and those fixed with trusts could not be interfered with. Sections 15, 17, and 20 also show that the trustees were to hold lands which they were to manage, sell, lease, or mortgage. By the 21st section, under certain circumstances, the charter is to become forfeited; but in such case also the property would revert to the Crown, subject to all engagements, and the trust would continue; *Lewin on Trusts* (b). Under the 7 G. IV., No. 4, the Orphan School lands were vested in the corporation at the time of its dissolution; and it cannot be that these lands, previously granted and vested in the corporation for the maintenance and education of the orphans, reverted to the Crown on the abolition of the charter, and became waste lands. Although the lands reverted to and revested in the Crown, the trust remained just as it was declared by the Crown itself that it should be. The effect of the 36th section is to enable the Crown to alter the object of the trust; but this and the primary trust are alike declared or provided for by the grant as well as by the charter of incorporation—and the objects defined are not too vague. There are several cases as to charities equally indefinite, and yet they were enforced; *Jarman on Wills* (c). And even where the proposed mode of

(a) Amending the 4 W. IV., No. 10.

(b) [3rd Edition], p. 280.

(c) 1 Vol. 200.

carrying out a charitable purpose was void, the grant was held applicable to a *cypres* charitable purpose, to be determined by the Crown; *The Attorney General v. Todd* (a).

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The *Attorney General* in reply. This is a mere question of law. Has the Crown created a trust which still subsists, and which the Crown cannot destroy. The grant does not refer to the charter, but is made "subject to the rules, declarations, &c., contained in the letters patent, &c., relative to the powers thereby given;" and, therefore, so much as relates to the power thereby given, is incorporated in the grant, but no more; there is no reference to the clause as to the dissolution. There is no limitation in the charter or in the grant to the Crown after the dissolution; and, therefore, the lands are now in the Crown, not by limitation or remainder, but by forfeiture; if not, by the simple failure of the entire thing; by the mere operation of the common law on the cessation of a corporation, to which these were granted. [Wise, J. If a corporation be dissolved, all the leases granted by the corporation are avoided (b), and this grant, being subject to the provisions of the charter, may be subject to the legal contingencies of the charter. But the usual rule is that a corporation can only be dissolved by legal proceedings.] The grant was not affected nor was the trust continued by the mere words of reference to the charter. The 86th clause has no efficacy, for land would have revested in the Crown without any such clause. There is no enforceable trust. No case will be found where a person has made himself a voluntary trustee in which a Court of Equity has interfered in the lifetime of the donor; *Hughes v. Stubbs* (c). In the cases of charities the question has arisen after the donor's death. There is also no privity. In cases of assignment to trustees for payment of the debts of the grantor without the knowledge or concurrence of the creditors, Courts of Equity, which look upon the

(a) 1 Keen 803.

(b) Hob. 121, cited in *Grant on Corporations*, p. 303. (c) 1 Hare 478.

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creditors as mere strangers, have refused to interfere as against the grantor; *Walwyn v. Coutts* (a). And what communication was there here between the Crown and the members of the Church of England? What privity is there between them? It is admitted that "by a rule peculiar to gifts of their nature, if the donor declare his intention in favor of charity indefinitely, without any specification of objects, or in favor of defined objects, which happen to fail, from whatever cause; although in such cases the particular mode of application contemplated by the testator is uncertain or impracticable, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality, or failure of its immediate objects, be carried into effect" (b). But the present is a disposition by the Crown which never dies, and does not come within this class of cases. And it is of so indefinite a character that a Court of Equity will not exercise any control over it. Again, the Crown has reserved to itself the power of dealing absolutely with the land for the purposes of education and religion as it might think fit; and it might, therefore, administer the fund in erecting a library or a courthouse, or in any other way as might seem to it expedient for that purpose; and how can a Court of Equity interfere? The defendant can not succeed unless there be rights possessed by some person or body, which, if the Crown had been a private individual, the Court would enforce. Moreover there is no trust for education and religion, but only a power reserved to the Crown to do as it likes with the lands for such purpose as the Crown shall deem to be those of religion and education. How could any trust be declared or executed in a case like that? How can any Court exercise a discretion which the Crown, who is the donor, has reserved to itself. [Stephen, C. J. But still is there not a trust?] No, there is nothing beyond the creation or reservation of a power. The Court will not and cannot give effect to an incomplete gift or disposition. When a person has ineffectually

(a) 3 Mer. 707, cited 1 Tudor & W. L. C. 209.

(b) 1 Jarman on Wills 199.

attempted, by an imperfect deed, to confer the whole interest upon volunteers or trustees for their benefit, it is not sufficient to create the relationship of trustee and *cestui que trust*; *Ellison v. Ellison* (a). In *Antrobus v. Smith* (b), it is said by Sir *W. Grant*, M. R. :— “There is no case in which a party has been compelled to perfect a gift, which, in the mode of making it, he has left imperfect.” Here nothing has been done to pass the property out of the absolute and unfettered control of the Crown. There cannot be a dedication or setting aside of Crown Lands by any mere order of a Secretary of State.

Their Honors now delivered judgment in this case as follows :—

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STEPHEN, C. J. This is a special case stated for the opinion of the Court, on the question whether certain lands in this colony, commonly known by the name of the Church and school lands, are subject to a trust for religious and educational purposes, binding on the Crown. Sir *William Manning*, Mr. *Darwall*, and Mr. *Gordon*, on behalf of the four leading religious denominations, supported the affirmative ; the Attorney General, Mr. *Martin*, maintaining the contrary. He contended that these lands are merely waste lands of the Crown ; but that, even if not, they still are not subject to any trust, cognisable in a Court either of law or equity. It was admitted for the religious bodies, and indeed it is undeniable, that the lands in question have ever since the year 1832 been legally vested in the Crown, although not so unqualifiedly or without condition ;—and, on the other hand, it appeared to be conceded by the Attorney General (as a proposition, perhaps, too long generally recognised to admit now of contest), that the Crown can in law be a trustee. But he insisted, that there was here no completed or effectually declared trust, such as a Court of equity would or could enforce, in the case of a private individual—and so, that

(a) 1 Wh & T. L. C. 218. in notis.

(b) 12 Ves. 39.

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there is none which can legally or equitably bind the Crown.

I understand this, therefore, to be the question for decision ; not whether there exists in the Crown a trust, in the popular or loose sense of the term, but whether—it being assumed that the execution of a trust cannot be enforced against the Crown,—there is such a trust here as could be enforced, were the trustee one of its subjects.

Now the facts of the case are in a narrow compass. The Crown, in 1826, erected a corporate body in this colony, with the object (as stated in the letters patent) of making provision "for the maintenance of religion and the education of youth" in the colony. The corporation was, for this purpose, to cultivate and improve such lands as should be granted for it, a certain portion of which might be sold, or leased by the corporation ; and was annually to devote one moiety of the net proceeds, after audit, to the building and repair of Churches and schoolhouses, and the further improvement of the lands granted,—and the other moiety to the support of the clergy of the Church of England, and the support of schools and schoolmasters in connection with that Church. There was a clause, however, enabling the Crown to dissolve the corporation ; in which event it was declared that all the lands granted should revert to and be absolutely vested in the Crown, subject to all existing contracts in respect thereof, to be "held, applied, and disposed of, in such manner as shall appear to us, our heirs and successors, most conducive to the maintenance and promotion of religion, and the education of youth in the said colony."

In accordance with the provisions of this charter, and in pursuance of instructions from the Crown to the Governor, sundry grants of land were in 1829, and afterwards issued to the corporation, including the lands now in controversy ; which grants are declared, in terms, to be made for the following purpose, that is to say :— "the purpose of making provision for the maintenance and promotion of religion, and the education of youth in the said colony." There then follows a declaration

that the grant is "subject in all respects to the provisions, declarations, and regulations contained in the letters patent,"—and there is a similar clause at the end of each grant, that the land shall be "subject also to the rules, declarations, ordinances, provisoess, and directions contained in the letters patent, relative to the powers thereby given to the corporation."

So far, there can be no possible room for doubt. The Crown has here not merely, as was suggested on the argument, declared the intended objects of a future trust. It has actually and finally created the trust, and carried those previously declared objects into effect. There is nothing inchoate about the transaction ; the thing is complete and accomplished. The lands are granted on the specific trusts ; in the first place for carrying out which the corporate body was established—the general object being, as declared both in the charter and the grants, the advancement of religion and the education of youth. But, as the charter had provided for the possible dissolution of that body, and for the trusts on which these lands should then be holden, each grant contains clauses in addition, that the land and the interest of the corporation therein shall, in the second place, be subject to all the other declarations, provisoess, and directions of the letters patent. Thus as to each tract of land, the charter and the grant, both equally acts of the Crown, become in effect and legal operation one instrument. And the result clearly is, I apprehend, that, upon the dissolution of the corporation, these granted lands would vest in the Crown on the same general trust. Not necessarily, indeed, (nor perhaps at all, though I give no opinion on that point,) for the benefit of one particular church or denomination, but certainly for the declared object of advancing the cause of education and religion in the community.

These observations dispose of the argument, that the letters patent are not equivalent to an enactment, and have in fact in themselves no effective operation. It is of course true that the charter alone impressed no fiduciary character on any land. But the answer is, that

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the grants subsequently issued did; and that they accomplished this, by expressly referring to, adopting, and incorporating themselves with that charter. Nor was there anything unusual in that mode of proceeding; since nothing is more common than to convey lands by one instrument or set of instruments, and to declare the trusts or intended trusts of them by another.

But, when once a trust is effectually declared and created, for any religious or charitable purpose, Courts of Equity will not permit the trust to fail, either for the want of a proper trustee or of definite and ascertained objects. There are numerous instances in which the Courts have exercised this power of supplementing, and so carrying out trusts of a charitable or pious character. This appears to me to be a sufficient answer to the objection, that the Crown has here left every thing uncertain; there being, it is said, not only no particular religious denomination, or kind or mode of education indicated, but the extent and manner of appropriation, as to each, being left to the decision of the Crown itself. The question in all such cases is, whether there exists substantially a trust which it is possible to execute. If there be such a trust, its vagueness or uncertainty will not avoid it, but the Crown or the Court will supply all deficiencies.

On this last head a host of authorities might be referred to; most of which are cited in 2 *Story Eq. Jur.* (a). Among others the following may be mentioned, *Wilkinson v. Mallin* (b), *Attorney General v. Pearson* (c), *Moggridge v. Thackwell* (d), *Attorney General v. Doyley* (e), and the *Attorney General v. Matthews* (f). In one case, cited in *Moggridge v. Thackwell*, it is said that if a testator bequeaths money to such charitable uses as he shall direct, and he leaves no direction, the Court would determine those uses (g). But there are even stronger examples. In the *Attorney General v. Doyley*, the bequest was to trustees, to dispose of the property in

(a) ss. 1153 to 1171. (b) 2 *Tyr.* 544.
 (c) 3 *Meriv.* 409. (d) 3 *Br. C. C.* 517, and in 7 *Ves.* 37.
 (e) Cited in *Viner's Ab. Charitable Uses*, C.; and in 10 *Ves.* 538.
 (f) 2 *Iev.* 167. (g) See also *Vin. Ab. ubi supra* D.

such manner and proportions as they should think fit, to such charitable uses as they should think most proper. That trust was executed by the Court. The general doctrine is thus laid down in *Morice v. The Bishop of Durham* (*a*), by Sir William Grant, "If there be a clear trust, but for uncertain objects, the property which is the subject of the trust is undisposed of, and the benefit of such trust must result to those to whom the law gives the ownership in default of any disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object ; there must be somebody in whose favor the Court can decree performance. But it is now settled, upon authority, which it is too late to controvert, that where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object—but the particular mode of application will be directed by the King in some cases, and in others by this Court." That a merely voluntary trust will be enforced, even in cases not charitable, where it has been perfectly created, is established by many decisions (*b*).

This then being the state of the case, so far as the question at issue depends on the charter and the grants, the fact has next to be mentioned that in February, 1833, the Crown exercised its reserved power, and formally dissolved the corporation. My opinion as to the effect of this dissolution has been already expressed. I conceive that it was, firstly, to substitute the Crown for the corporation as the trustee, and secondly, to leave the general trust for the promotion of religion, and for the education of youth, but without specific limitation necessarily to one denomination,—untouched.

It remains for me then only to consider, whether the trust thus created has been annulled or altered by legislative enactments, or whether any such enactment affords ground for holding, that since the dissolution of the Corporation no such trust has existed.

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(*a*) 9 Ves. 405.
(*b*) See Lewin 2nd ed., p. 87 ; and cases there.

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The first enactment relied on under these heads, or the latter of them, is the Colonial Act, 5 W. IV., No. 11, passed in August, 1834, to regulate the affairs of the late corporation, and to secure to purchasers from it their titles to the land purchased. All that this statute can be said to have done, however, material to the point under review, is as follows:—It recites that all the lands, and also all the other property of the corporation, had (in the language of the dissolution clause of their charter) reverted to and become absolutely vested in his Majesty; and, in so doing, and afterwards enacting measures for collecting the rents and moneys due to the corporate body, the Act throughout omits all mention whatever of there being any continuing trust.

I discover nothing in this, or any other provision of the statute, to justify the inference contended for. The mention of any such trust, if continuing, would have been foreign to the objects of the Act. These appear to have been, partly to quiet all apprehension or uncertainty, on the part of purchasers from and mortgagors to the late corporation, and partly to facilitate the collection of its debts and farming stock. But, if the legislature had really supposed that corporation lands—that is to say, the lands granted to and not sold by that body—were no longer subject to any trust, I think that the Act would have authoritatively so declared. The efficiency of such a declaration might, perhaps, have been questionable; but its importance could hardly have failed to occur to the mind, for the words creating (or which must have seemed intended to create) a trust, were assuredly sufficient to at the least inspire doubt. It is remarkable, however, that this statute does not even declare these lands to be vested in the Crown. It merely recites the fact, in the preamble, that they had become so vested; and then in section 8 empowers the agent, appointed under the Act, to protect them from encroachment. If the lands were supposed then to be, or were intended to be thenceforth dealt with as, waste and unfettered Crown lands, it is difficult to see why a separate agent should have been established by statute for their

management or supervision, different from that which was created (by the 4 W. IV., No. 10, and 5 W. IV., No. 12) for the management or supervision of the other Crown lands.

The several Colonial Acts afterwards passed, the 7 W. IV., No. 4, 2 Vic., Nos. 19 and 27, and 5 Vic., No. 1, to restrain the unauthorised occupation of Crown lands, all relate evidently to the waste and unalienated Crown lands, properly so called—not to the granted, but revested, church and school lands. These successive enactments, therefore, present the same arguments as I last adduced with respect to the 5 W. IV., No. 11, to show that the legislature was probably aware of and recognised the different character of the two classes.

The next Act is that of the Imperial Parliament, the Australian Waste Lands Act of 1842 (a); from which, I have no doubt, that the lands in question are excepted. It is enacted by sect. 23 in substance, that the term "waste lands" in this statute shall not include any land "dedicated and set apart for some public use." Considering this, and the solemnity of the declaration made in the letters patent, together with the enactment in sect. 20 that nothing in the Act shall affect any contract, or prevent the fulfilment of any promise, made on behalf of her Majesty as to land in the colony (although the promise made here was by her Majesty's predecessor), it appears to me impossible to hold that this statute comprehends any land, the subject of such a declaration. Surely, the general promotion of religion and of education is a public use, although the expression may not have been framed to meet the particular instance; and the words of the dissolution clause, devoting the corporation lands to that object, amount to a dedication of the most formal kind.

But, had there been no such sections in the Act, the construction insisted on for the plaintiff would still, in my opinion, be a strange one. If the trust did not, when that Act was passed, exist, the term waste lands would of course include those granted to the corporation,

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and there would be no need of discussion on the subject. If, however, the trust did at the time exist, on what ground shall we conclude that the Imperial Legislature meant to, or did—without express words, too, and by the mere use of a general phrase,—abrogate and destroy it? But the reasonable construction of the statute is, that it embraced only lands of which the Crown was the beneficial, or at least the unfettered owner; not lands revested in the Crown by its own appointment, subject to a deliberately declared trust, and which could only be devoted to the purposes of that statute, by committing a breach of that trust.

Another argument of the Attorney General, on which I shall say a few words, was founded on the New South Wales Constitution Act of 1853 (a), and the Imperial Enabling or Assenting Act of 1855 (b). The second section of this last Act vests in the Colonial Legislature, it was urged, the “entire control of the waste lands belonging to the Crown” in the colony. The answer is that already given. Lands vested in the Crown on a trust do not, in any true or just sense, belong to the Crown; they are, therefore, not within the enactment. Thus Sir *William Grant*, in the case already cited from 9th Vesey, says—“There can be no trust, over the exercise of which this Court will not assume a control—for an uncontrollable power of disposition would be ownership, and not trust.”

The answer applies equally, of course, to sections 50 and 58 of our Constitution Act. The latter has exactly the same words, as those quoted from sect. 2 of the English statute. And section 50 does not carry the argument one step further. The “Civil List” is there declared to be granted, in lieu of all “territorial and other revenues of the Crown—to the disposal of which the Crown may be entitled, absolutely, conditionally, or otherwise.” In what other mode than “absolutely or conditionally” the Crown can be entitled to any such revenue, I do not at this moment perceive; but, on the assumption that there is a trust as to these lands, the Crown cannot be entitled (in the sense obviously here in-

tended) to dispose of their revenue in any mode. Neither, on the same assumption, can the revenue arising from them be—for the reason already given—deemed a revenue of the Crown. For the Crown is merely, as a trustee, the recipient of the revenue for prescribed purposes; but if a trustee of it for any purpose, the Crown cannot be its owner. It is, therefore, no portion of the Crown revenue.

For the reasons assigned, I am of opinion that the church and school lands always have been, and still are, holden in trust for the maintenance and promotion of religion and the education of youth in this colony; that the Crown is, at this moment, a trustee of the lands for these purposes; and that it is a trust, the execution of which, in the case of a private individual, could be enforced against that individual.

MILFORD, J. Prior to the charter of the 9th of March, 1826, the Sovereign had absolute power to dispose of the Crown lands in this colony as he thought proper. He could grant any portion to an individual either absolutely or conditionally, for an estate in fee or for an estate of freehold less than a fee, or for a term of years, or for an estate in fee to cease on some specified event, with a declaration of trust to commence on the happening of that event, and so to a corporation. The Sovereign could grant land to a corporation in fee, determinable on some event, and declare that on that event happening it would stand thenceforth seized of the property upon trust for some other individual, or for charitable trusts. It is not necessary to consider whether, at common law, the fee being granted, a limitation after it would be valid, for a declaration of trust is not governed by the same laws as to the limitation of an estate after an estate granted in fee as is the legal interest in land.

By the charter incorporating the clergy and school trustees, the Sovereign, after reciting that he had thought proper to erect and to vest in the corporation such lands and tenements as should be sufficient to make a provision for the maintenance of religion and the education of youth in this colony, granted and declared that certain persons

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therein named should be a corporation, by the name of the trustees of the clergy and school lands in the colony of New South Wales, and by that name might take and hold lands within the colony, with powers to sell, mortgage, and let the lands that might be granted to them by the Crown, and the lands and tenements theretofore appropriated for orphans; and the glebe lands, after the avoidance thereof by the clergymen in occupation of them, were to vest in the corporation. The 36th clause is as follows:—We do further will and ordain that it shall be lawful for us, our heirs and successors, by any order to be issued by us for that purpose, with the advice of our or their Privy Council, to dissolve and put an end to the said corporation, and thereupon all the lands which may by us, our heirs or successors, be granted to the said corporation, shall revert and become absolutely vested in us or them, subject to all mortgages and contracts for the sale thereof lawfully made by the said corporation, to be held, applied, and disposed of in such manner as to us, our heirs and successors, shall appear most conducive to the maintenance and promotion of religion, and the education of youth in the said colony.

By this instrument the Crown declares what the trusts of the lands which may be granted to the corporation shall be. Whilst the corporation shall exist, the lands are to be held by the corporation upon the trusts declared by the charter; and, after it shall cease to exist, the lands are to be held by the Sovereign for the promotion of religion and education of youth as the Sovereign shall think fit. The declaration of trust is complete, and the lands which should afterwards be granted to the corporation could not by grant, declaration of trust, or other instrument executed by the Crown, be turned aside from these trusts. Acting under the power retained by the Crown, they might, after the corporation had ceased to exist, be disposed of as the Sovereign should think most conducive to the maintenance and promotion of religion and the education of youth, but that is only carrying out the trusts declared by the charter. The last clause of the charter points out what lands are to be held by the Crown

discharged from the trusts before declared, viz., those not wanted for the above purposes. The trusts are as completely declared as it is possible to be; the lands to be granted to the corporation are to be held upon those trusts, and their vagueness is no objection to their validity. The grants which were made to the corporation, after instructions from the Crown were received, and after the creation of the corporation, conveyed land to the corporation for the purpose of making provision for the maintenance and promotion of religion and education of the youth in the colony, but subject in all respects to the provisions, declarations, and regulations contained in the letters patent creating the corporation (amongst which is the provision for determining the corporation). They were made subject, amongst other things, to the rules, declarations, ordinances, provisoies, and directions contained in the said letters patent creating the aforesaid corporation, relative to the powers thereby given and granted to the said trustees and their successors.

This, therefore, is a grant to the corporation in fee, subject to the power reserved to the Crown to determine the estate granted, and upon such determination the trusts, declared by the charter to take effect after that determination, would come into operation.

The corporation was dissolved on the 4th of February, 1833, by order in Council, and thereupon the ultimate trusts declared by the charter came into operation. The Sovereign then held the lands granted "to be applied and disposed of in such manner as to him should appear most conducive to the maintenance and provision of religion and the education of youth in the said colony." How far the charter could deal with the orphan and school lands we are not called upon to decide. There may be doubts whether they could have been dealt with by the Crown after having already been granted upon certain trusts, but it is clear that the Sovereign could dispose of the church and school lands in such manner as should appear to him or her most conducive to the objects mentioned in the proviso. We are not called upon

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to say what those objects are, whether general or particular. The Crown, however, has considered that they are general, and by despatches in the year 1835, directed the mode of application and disposal.

It remains to consider whether any legislation subsequent to the charter has affected the trusts. The 5th William IV., No. 11, passed on the 5th August, 1834, authorised the Governor to appoint an agent for the management of the property, but did not alter the trusts declared by the charter. The recital is that the lands of the corporation reverted to and became vested in his Majesty, which is correct, but the Act in no other way affects the present questions. The Imperial statute, 5 and 6 Vic., c. 36, usually called the Waste Lands Act, passed on the 22nd June, 1842, enacts that the waste lands of the Crown shall be disposed of in the manner thereafter described, and not otherwise, and then proceeds to direct how this is to be done. By the 20th section it is enacted that nothing therein contained should affect any contract or prevent the fulfilment of any promise or engagement made by or on behalf of her Majesty, with respect to any lands situate in any of the said colonies, in cases where such contracts, promises, or engagements shall have been lawfully made before the time at which the Act should take effect in any such colony; and by the 23rd section it is declared that by the words, waste lands of the Crown, as used in that Act, are intended and described any lands situate therein, and which then were or should thereafter be vested in her Majesty, her heirs and successors, and which had not been already granted or lawfully contracted to be granted to any person or persons in fee simple, or for an estate of freehold, or for a term of years, and which have not been dedicated and set apart for some public use. By the 20th section of the Act, these lands were exempted from the operation of the Act, there having been an engagement lawfully made that they should be held upon the trusts declared by the charter; but putting aside this section, it is quite clear to me that the church and school lands had been granted for a charity, and had been set

apart for a public use, as mentioned in the 23rd section, viz., the promotion of religion and education of youth. By the 50th section of the Constitution Act, 18 and 19 Vic., c. 54 (a), the civil list is to be taken instead of all territorial, casual, and other revenues of the Crown, including all royalties from whatever source arising within the said colony, and to the disposal of which the Crown may be entitled, either absolutely or conditionally, or otherwise, howsoever. By the 58th section of the same Act, the management of the waste lands of the Crown, and the appropriation of the proceeds, are vested in the legislature. Provided that nothing therein contained shall affect any promise or engagement of the Crown in respect of such lands, or prejudice any vested right belonging to the licensed occupants or lessees of the Crown lands, by virtue of the Act of the 9 and 10 Vic., c. 104, or of any orders in Council. I am of opinion, on the construction of this Act, that even if these sections would by the expressions, "wastelands of the Crown," and "territorial revenue," relate to the church and school lands, they are exempted by the proviso that the engagement relating to them, *i.e.*, the declaration of trust contained in the charter, is not to be disturbed.

To the first question—whether upon the dissolution of the corporation the lands granted to or become vested in it reverted to and became waste lands of the Crown—I answer that on the dissolution of the corporation the lands reverted to the Crown, by virtue of the charter itself, and that they never became waste lands of the Crown after being granted to the corporation.

To the second question—whether upon the dissolution of the corporation the lands granted to or vested in it reverted to the Crown, upon trust, to be applied and disposed of in such manner as to the Sovereign appears most conducive to the maintenance and promotion of religion and the education of youth in the colony—I answer that on the dissolution of the corporation the lands reverted to the Crown, and were held by it upon the trusts mentioned in the question.

(a) 17 Vic., No. 41—schedule (1) of 18 and 19 Vic., c. 54.

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To the third question—whether the sum of £3,419 0s. 4d. formed a portion of the consolidated revenue of the colony, or was held by the Crown in trust—I answer it was held by the Crown in trust. I am of opinion that the verdict ought to be entered for the defendant.

WISE, J. My learned brothers having so fully stated the facts, it is unnecessary for me to repeat them, but I will proceed at once to the questions submitted for consideration.

The first is—"1. Whether, upon the dissolution of the corporation of the trustees of the clergy and school lands in the colony of New South Wales, the lands granted to or otherwise vested in the corporation reverted to and became waste lands of the Crown in the said colony."

The answer to this question depends on the construction of the 5th and 6th Victoria, chapter 36.

Prior to the passing of this Act, the Crown had the sole power of dealing with the lands in the colony, but by that Imperial statute the "waste lands of the Crown" were to be conveyed or alienated only in the manner and subject to the regulations prescribed by that statute. The third section, however, excepted from the operation of the Act lands required for certain specified public purposes; and the 20th section reserved all existing promises and engagements, made by or on behalf of her Majesty, with respect to any lands in the colony.

But the 23rd section overrides the whole Act, because it defines the lands to which the enactments were to apply; and by it, "waste lands" (that is the lands that are to be disposed of under the Act) are defined to be "any lands situate therein (in the colony), and which now are, or shall hereafter be, vested in her Majesty, her heirs and successors, and which have not been already granted, or lawfully contracted to be granted, to any person or persons, in fee simple, or for an estate of freehold, or for a term of years, and which have not been dedicated or set apart for some public use."

The 9th and 10th Victoria, chapter 104, section 9, contains the same definition.

Now, at the time of the clergy and school lands being granted, the Crown had a discretionary power of dealing with the lands in the colony, unfettered by any Act of parliament; and, although it is clear, that during the existence of the corporation their funds were to be applied to religious instruction and education in the principles of the Church of England (subject to the very improbable state of circumstances referred to in the 38th clause), yet the 36th clause reserved a limited power of dissolution to the King in Council, in which case it was declared "that all the lands which may be granted to the corporation shall revert and become absolutely vested in the Crown, subject to all mortgages and contracts for the sale thereof lawfully made by the said corporation, to be held, applied, and disposed of in such manner as to the Crown shall appear most conducive to the maintenance and promotion of religion and the education of youth in the said colony." Such dissolution took place in 1833.

If, therefore, the above clause in the charter constituted a dedication or setting apart to public use, no lands so vested in the Crown were waste lands within the meaning of the 5th and 6th Victoria, chapter 36.

Now a devise in such terms as these would be a good charitable devise, for even where the fund was devised to be applied by trustees according to their discretion for the advancement and propagation of education and learning all over the world, it was decided by the House of Lords to be a good charitable bequest, and not void for uncertainty; *Whicker v. Hume* (a). A public trust, and a charitable trust, may be considered as equivalent expressions—and if the maintenance and promotion of religion and education of youth in a colony be not a public use, it seems to me impossible to specify any appropriation of lands which could be so described.

The argument once used, but not, I think, relied upon by the learned Attorney General on the argument before us, that the words public use in the 28th section must be

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(a) 7 H. L., C. 125; 28 L. J. Ch. 396.

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construed together with the 3rd section, and can only include such public purposes as are mentioned in that section, seems to me to be without any weight. The 3rd section excepts out of the operation of the Act lands required for the purposes specified, even although they may be waste lands within the 23rd section; but the 23rd section declares that lands dedicated and set apart for some, that is, for any public use, shall not be waste lands at all—in other words, shall be left to be dealt with by the Crown, just as if the 5th and 6th Victoria, chapter 36, had not been passed.

I am clearly of opinion, therefore, that the answer to the first question must be that whatever lands were granted to the corporation, did revert and become vested in the Crown upon its dissolution. I do not say they become waste lands, because that term did not, as far as I am aware of, acquire any specific legal meaning before the 5th and 6th Victoria, chapter 36; and as the dissolution took place in 1833, it could hardly be said that at that time they became waste lands of the Crown.

The second question is—"2. Whether, upon the dissolution of the said corporation, the lands so granted or vested reverted to the Crown upon trust, to be applied and disposed of in such manner as to his Majesty and to his heirs and successors should appear most conducive to the maintenance and promotion of religion and the education of youth of the said colony."

Much that has been already said bears upon this question, which I do not doubt must be answered in the affirmative. Unless it is impossible for the Crown to become a trustee, the words of the 36th clause of the charter, followed by the continual recognition that the lands were appropriated and dedicated to the support of religion and education in the colony, are sufficient to fasten a trust upon those estates that reverted to the Crown at the dissolution of the corporation.

I am not aware of any authority to the effect that the Crown cannot be a trustee; and, on the other hand, the uniform statement, as I believe, of text writers has been that the character of the Sovereign is not incompatible

with that of a trustee, although as to the means by which the trust could be enforced there was necessarily considerable difficulty, according to the ordinary forms of law; *Spence on Equitable Jurisprudence* (a), *Casberd v. Attorney General* (b). Probably a petition of right might be the remedy, for to use the words of Lord Chief Justice *Denman*, delivering the judgment in Baron *De Bode's* case (c), "There is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy for such wrong;" and see also the judgment of the Court of Exchequer Chamber (d). A trust, indeed, may exist for some purposes, although the *cestui que trust* may not have the power of enforcing it. Thus, in the recent case of *Barow v. Wadkin* (e), it was held that by reason of the personal incapacity of an alien, he could not take the benefit of a devise of real estate in trust for him, but that the trust was to be executed for the benefit of the Crown to the exclusion of the heirs-at-law. And in the course of a very elaborate judgment delivered by the Master of the Rolls the following passage occurs, which may well be quoted here:—

"It is said that the Crown comes under no head of equity, and that it cannot enforce any equitable right whatever. This would appear to be a strange proposition, if it be law laid down in the fullest extent, considering what equity professes to be, and what it really is. If the Crown be neither entitled to obtain equity, nor required to perform it (for the rights and obligations in such a case would be reciprocal), it would seem to be opposed to those principles which obtain in every other part of the law and jurisprudence of this country."

It is not surprising that the mode of enforcing a trust against the Crown should not have been the subject of judicial decision, as the principle, that the law is to be obeyed by the Crown as well as by every other power in the state, has been too long recognised as the foundation of all constitutional government, to admit of a doubt, that a trust once shown to exist in the Crown, would be executed

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(a) Vol. 2, p. 32. (b) 6 Price 463. (c) 8 Q. B. 274.
(d) 13 Q. B. 384. (e) 27 L. J. Ch. 129.

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by the Crown without the necessity of any recourse to legal machinery. The question, however, for our consideration, is only whether the trust exists, not the mode of enforcing it; and, as already stated, I am of opinion that it does exist, according to the terms of the 36th clause of the charter for the maintenance and promotion of religion, and the education of youth in the colony. It was, however, contended by the learned Attorney General, that the 5th William the 4th, No. 11, which recites that upon the dissolution of the corporation of the trustees of the clergy and school lands, all the lands vested in the said corporation reverted and became absolutely vested in his Majesty, showed that at that time the legislature considered that no trust existed.

Without minutely examining the scope and provisions of this statute, it is sufficient to say that "a mere recital in an Act of parliament, either of fact or law, is not conclusive, and the Court is always at liberty to consider the fact or the law to be different from the statement in the recital," *Reg. v. Inhabitants of Haughton* (a); or as is well put by Mr. Justice Story, "The preamble is properly referred to when doubts or ambiguities arise upon the words of the enacting part. The preamble can never enlarge; it cannot confer any powers *per se*. Its true office is to expound powers conferred, not substantially to create them."

The second question must therefore be answered in the affirmative.

The third question is—"3. Whether the sum of three thousand four hundred and nineteen pounds and fourpence formed a portion of the consolidated revenue of the said colony, or was held by the Crown in trust?"

To answer this question, it only remains for me to consider the effect of the Constitution Act, 18th and 19th Victoria, c. 54. By the 2nd section of that statute, the disposal of wastelands of the Crown was vested in the legislature of the colony—subject, however, to the proviso that nothing in that statute contained "should affect or be construed to affect any contract, or to prevent the ful-

filment of any promise or engagement by the Crown with respect to any lands." Now, if the words "wastelands," as I think is most reasonable, are to be construed to have the same meaning in this statute as that recognised by previous legislation, it follows that lands upon which a trust has fastened would not be within the enacting clause, and such lands therefore would not be within the powers vested in the legislature of the colony (a). And even if the words waste lands belonging to the Crown, could be held to include all lands, the legal estate of which was then in the Crown, I should be of opinion that a trust, such as that created by the 36th clause of the charter, would be a promise or engagement, which was by virtue of the proviso just mentioned, to remain unaffected by the 18th and 19th Victoria, c. 54.

I am further of opinion that the 47th section of the Constitution Act (b), by which all territorial, casual, and other revenues of the Crown (including royalties), from whatever source arising within the colony, were made part of the consolidated revenue fund, does not include the proceeds of the church and school lands. Upon the assumption, that they were dedicated and set apart for some public use, either as a trust in its technical meaning, or by virtue of a promise or engagement of the Crown, they would not be such revenues of the Crown as could have been given up in return for a civil list, because they would be revenues not applicable by the Crown for its own benefit.

The expression, indeed, in the 50th section, "to the disposal of which (revenues) the Crown may be entitled, either absolutely or conditionally, or otherwise, howsoever," taken by themselves, would in some degree favour the argument that the revenues from the church and school lands were to form part of the consolidated revenue; but when it is considered that the 47th section, which is the clause which expressly enacts what shall be comprised in the consolidated revenue, does not use the

(a) See the opinions of all the Judges in the Canada Reserves Case, 1 Burns' Ecc. L. 415; and Hansard's Parliamentary Debates, vol. 51 pages 1156-1158.

(b) 17 Vic., No. 41.

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words, and that to give them the effect contended for would be directly at variance with what I apprehend to be the true construction of the 2nd section of the Imperial Act, I am of opinion that the incidental use of them in the 50th section does not destroy the trust character of the church and school lands.

Upon the argument, the Court was pressed by the Attorney General to declare the exact nature of the trust, and to decide whether it extended to any other body than the Church of England. But this question is not submitted to us by the case, and it is not necessary for the decision. The Attorney General would not be entitled to judgment in his favour, unless the sum of money in question was part of the consolidated fund; and as the opinion of the Court is that it is not, the defendant is entitled to the judgment, without reference to the particular application of the trust money.

The effect also of some of the arguments put forward by the Attorney General would depend upon questions of fact which are not in evidence before us, as, for instance, that a trust for Roman Catholics could not be supposed to have been within the intention of the Crown prior to the Roman Catholic Relief Act. But if, as I believe was the case, Roman Catholic chaplains in the colony were paid by the state before that Act passed, the force of this argument would be much weakened, if not destroyed. It may well be also that the state of the law at the time of the dissolution of the corporation would be considered to govern the trust, just as it was held after the passing of some of the Catholic Relief Acts, that a legacy, though unlawful at the time of the making of the will and death of the testator, could, after the passing of these statutes, be claimed by the legatee; *Bradshaw v. Tasker* (a).

Moreover, the decisions in this Court of *King v. The Bishop of Sydney*, and the Bishop of Cape Town's case in the Privy Council, tend to show that there would have been nothing unlawful, even in 1826, in a general trust for religion and education in the colony, the benefit of which the various religious bodies might partake.

The decision in the Canada Reserves case turned upon the meaning of the words "Protestant clergy" in a statute, and therefore had no bearing upon this branch of the question.

For the reasons given, therefore, I am of opinion that the defendant is entitled to the judgment of the Court.

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[NOTE A.]

No. 1.

COPY OF A LETTER FROM THEIR HONORS THE JUDGES OF THE
SUPREME COURT TO HIS EXCELLENCY THE GOVERNOR.

Sydney, 8 August, 1881.

SIR,—We have to acknowledge the honor of receiving your letter of the 2nd instant, together with an extract of additional instructions received from his Majesty by your Excellency, under date 30th January, 1880, with reference to the corporation of trustees of clergy and school lands in this colony, requesting our opinion whether the form for putting an end to and dissolving the corporation must indispensably be that which is pointed out in the letters patent of the 9th of March, 1826, establishing the same; and if not, whether the accompanying additional instructions, revoking and annulling the instructions of his late Majesty, under which the said letters patent were issued, are sufficient for that purpose, and for resuming the lands granted to the corporation in as full and ample a manner as if such letters patent had never been issued.

Upon the first point we are of opinion that, although his Majesty may, in pursuance of the power reserved to the Crown, revoke the whole of the provisions of the charter, by instructions under the sign manual, and thus reduce the corporation to a nonentity in effect, yet, as this power is coupled with that of establishing other provisions in their stead, and as there is a distinct mode pointed out by the charter of dissolving the corporation, in legal strictness the power of dissolving and putting an end to the corporation can be duly exercised only by force of an "order to be issued by his Majesty for that purpose with the advice of the Privy Council;" and as we do not collect from your Excellency's letter to us, that the last clause in the extract transmitted for our perusal from additional instructions to your Excellency under the sign manual, dated 30th January, 1881, is founded upon an order issued by his Majesty "with the advice of the Privy Council," it would seem that the instructions for dissolving and putting an end to the corporation are not conformable to the manner in which the power reserved to the Crown is required to be exercised by the express terms in the original letters patent establishing the corporation.

Upon the second point referred to us we are of opinion, that upon the dissolution of the corporation the lands granted to them for the purposes of the trust created by the charter will not revert to the Crown in as full and ample a manner as if the letters patent establishing such corporation had not been issued; but that by the terms of the thirty-sixth section of the charter all such lands will continue liable to the trusts therein particularly mentioned; and if it be intended to dispose of such lands in any other manner, we presume that it will be necessary to resort to parliament, or to

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an Act of the local legislature. We would take occasion to observe, that by a local ordinance of your Excellency in Council, passed in 1828 (No. 4, sec. 2), the lands therein mentioned are vested in the trustees of the clergy and school lands, and their successors for ever; and it will require another Act to enable the Crown to resume such lands, or to alter the trusts for which they were so vested.—We have, &c.,

(Signed) FRANCIS FORBES, Chief Justice.
JOHN STEPHEN, Justice.
JAMES DOWLING, Justice.

No. 2.

QUESTION SUBMITTED, 9 MAY, 1835, BY MR. BURDER TO SIR
W. FOLLETT, AND HIS OPINION THEREON.

Whether the clause of section 36, providing that on the dissolution of the corporation the lands held by it shall be applied and disposed of in such manner as shall appear to his Majesty "most conducive to the maintenance of religion and the education of youth in the said colony," are to be interpreted and governed by the declared intention of his late Majesty in making a reservation of those lands, and to be taken in connection with the same words in section 1 of the charter as well as with the instrument granting the lands, and so must be interpreted to mean religion and education according to the discipline and principles of the United Church of England and Ireland; or whether the lands which have now reverted to his Majesty may be legally appropriated to maintain and promote religion and education in a general sense, without any restriction as to the opinions and discipline of the particular Church, for the endowment of which they were originally set apart.

OPINION.

I am of opinion that under the clause in question his Majesty may apply the lands in such manner as *to him* may seem most conducive to the maintenance of religion and the education of youth in the colony, and that he is not necessarily compelled to apply them in the same manner as was done by his late Majesty, or to confine the application of them to persons connected with the Established Church.

Inner Temple.

W. W. FOLLETT.

May 14, 1835.

No. 3.

EXTRACT FROM LETTER OF SECRETARY OF STATE FOR THE
COLONIES TO GOVERNOR SIR GEORGE GIPPS.

Downing-street, 29 October, 1839.

... The Attorney (a) and Solicitor General (b) have reported their opinion, that it is competent to the Government to consider in what way the produce of the lands in question may be rendered most conducive to the maintenance and promotion of religion and education of youth in the colony, without reference to any particular Church, and that the measures adopted do give sufficient authority to enable the Government so to appropriate the property in question.

They further state, that they entirely concur with the colonial Judges in their opinion, that, by the dissolution of the corporation, the lands revert to

(a) Sir John Campbell, afterwards Lord Campbell.

(b) Sir Robert Monsey Rolfe, now Lord Cranworth.

the Crown, not "in as full and ample manner as if the charter had never existed," but for the purposes of the trust declared by the charter, in the event of the dissolution of the corporation, namely, "to be held, applied, and disposed of in such manner as to us, our heirs and successors, shall appear most conducive to the maintenance and promotion of religion, and the education of youth in the said colony."

And that the corporation, while it existed and held the lands, had the power, under the 15th section of the charter, of selling one-third of the lands; and if it now appears to the Crown to be most conducive to the objects of the present trust, namely, the promotion of religion and education generally, that the whole, instead of a part only, should be sold, they think there is nothing whatever to prevent such an exercise of discretion.

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No. 4.

OPINION OF J. H. PLUNKETT, Esq., ATTORNEY GENERAL, AND
W. M. MANNING, Esq., SOLICITOR GENERAL.

Attorney General's Office, 1 December, 1846.

SIR,—With reference to the letter of the agent for the church and school lands, dated 22nd September, 1846, respecting the leases of those lands, which letter his Excellency the Governor was pleased to refer to us for our report thereon, we have the honor to state that we have carefully examined the letters patent, incorporating "the trustees of the clergy and school lands;" copies of the grants to that corporation; the Secretary of State's despatches of 25th May, 1829, and 19th June, 1830, together with the King's instructions enclosed in the latter despatch, for altering the management of the affairs of the corporation; the order in Council revoking the above letters patent; and the colonial Act of 5 William IV., No. 11; and the Imperial Act of 5 and 6 Vic., cap. 36; and that we are of opinion that the lands originally granted to the late corporation, and resumed by the Crown upon its dissolution, are not "wastelands" of the Crown within the meaning of the Crown Land Sales Act, by reason of their having been "dedicated and set apart for a public use," and that consequently they may be leased in the same manner as previously to the passing of that Act.

We have, &c.,

J. H. PLUNKETT, Attorney General.

W. M. MANNING, Solicitor General.

The Honorable the Colonial Secretary.

No. 5.

OPINION OF JAMES MARTIN, Esq., ATTORNEY GENERAL, AND
ALFRED P. LUTWYCHE, Esq., SOLICITOR GENERAL.

Attorney General's Office,

Sydney, 2 October, 1856.

SIR,—Referring to a letter addressed from your office on the 26th February last, No. 173, to the Crown law officers, and enclosing the copy of a letter, dated 14th of February, from the Acting Auditor General, we have the honor to make the following report for the information of his Excellency the Governor General:—

1. The church and school lands, comprehending nearly 450,000 acres, appear to have been granted to a corporation, created by royal charter in 1826, in order "to make provision for the maintenance of religion and the education of youth in the colony of New South Wales."

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2. In 1833 the corporation was dissolved, under a power reserved in the charter, by an order in Council dated on the 4th February in that year.

3. On the 5th August, 1834, an Act of Council (5 Will. IV., No. 11) was passed for regulating the affairs of the late corporation, and to secure to purchasers their titles to lands purchased by them from the said corporation. The preamble of that Act recites, that on the dissolution of the corporation all the lands vested in the said corporation reverted and became absolutely vested in the Crown, but contains no provisions for carrying out the trusts for which the corporation was created.

4. Apparently, however, upon the ground that the Crown, although it could not be a trustee in a strictly legal sense for anyone, was yet a trustee in public policy for the maintenance of religion and the education of youth, the Government of the day seems to have considered that the lands in question ought to be reserved for those objects.

5. No systematic plan appears to have been adopted to form (a) to advantage the estate until 1841, when a scheme was approved of for granting leases for seven, fourteen, and twenty-one years.

6. On the 22nd June, 1842, an Imperial Act (5 and 6 Vic., cap. 36) was passed for regulating the sale of waste land belonging to the Crown in the Australian colonies. The 23rd section of that Act defines the words "waste lands" to mean lands "which now are or shall hereafter be vested in Her Majesty, and which have not been dedicated or set apart for some public use."

7. In 1843 the scheme of granting leases for terms of seven, fourteen, and twenty-one years was abandoned, upon the supposition that the lands originally granted to the corporation had, by its dissolution, become absolutely vested in the Crown, and that consequently they were "waste lands" within the meaning of the statute last referred to.

8. The matter having been referred to the law officers, the late Attorney and Solicitor General, Mr. *Plunkett* and Mr. *Manning*, on 1st December, 1846, gave a joint opinion that the lands in question were not "waste lands" within the meaning of the Act 5 and 6 Vic., cap. 36, upon the ground that they had been "dedicated and set apart for a public use."

9. We regret that we are unable to concur in that opinion. We think that the 3rd section of the Act clearly shews what the Imperial Parliament contemplated by lands "dedicated and set apart for a public use." That section excepts from the operation of the Act lands required for public uses, and specifies "such lands as may be required for public roads or other internal communications, whether by land or water, or for the use or benefit of the aboriginal inhabitants of the country, or for purposes of military defence, or as the sites of places of public worship, schools, or other public buildings, or as places for the interment of the dead, or places for the recreation and amusement of the inhabitants of any town or village, or as the sites of public quays or landing places on the sea coast or shores of navigable streams, or for any other purpose of public safety, convenience, health, or enjoyment."

The words which are underlined can only be construed according to the rules laid down for the interpretation of statutes to be purposes of the same kind as those previously enumerated; and we are of opinion, that the maintenance of religion and the education of youth are not purposes which the Imperial Parliament had in view by that section.

10. We are fortified in the opinion above expressed, by observing that the late Attorney General, Mr. *Manning*, in a memorandum dated 17th June

last, suggests that there may possibly be ground for dissent from the opinion of Mr. Plunkett and himself, dated 1st December, 1846.

11. As we think that the lands in question were absolutely vested in the Crown at the time of the passing of the Act 5 and 6 Vic., cap. 86, it follows, that all revenue derived from the clergy and school estates forms a portion of the consolidated revenue fund, which, under section 47 of the Constitution Act, includes all territorial revenues of the Crown, and must be accounted for to the legislature of the colony.

12. We are of opinion, that it will be necessary to introduce a bill into the legislature to carry out, in a legal manner, any of the objects to which the income derived from the lands in question has hitherto been applied.

We have, &c.,

JAMES MARTIN,
ALFRED P. LUTWYCHE.

The Honorable the Colonial Secretary.

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No. 6.

OPINION OF J. B. DARVALL, ESQ., SOLICITOR GENERAL.

The Church and school lands were granted by the Crown to a corporation, which was created by charter on the 9th March, 1826, and called "The Trustees of the Clergy and School Lands in the colony of New South Wales," with powers to hold, let, sell, cultivate, mortgage, &c., &c.

2. By the 36th clause of this charter the Crown was empowered to dissolve the corporation if it should seem expedient, and therefore the land was to revert to, and become absolutely vested in, the Crown (subject to existing contracts or mortgages, &c., &c.), "to be held, applied, and disposed of by the Crown in such a manner as to the Crown should appear most conducive to the maintenance and promotion of religion and the education of youth in the colony."

3. By the contemplated exercise of this power the charter seems to me to have intended the destruction of the corporation, but the preservation of the trusts, and that the lands should vest in the Crown, not as absolute owner, but as a trustee for a particular purpose consistently with the original dedication of the land.

4. The King can, I apprehend, be a trustee of lands, although he cannot be compelled to execute the trusts, and that, by the due exercise of the powers in the charter, the land would vest in the Crown as trustee.

5. On the 1st January, 1831, under a power in the charter to alter the management of the estate, commissioners were appointed to supersede the trustees in the management of the lands, which, however, still remained vested in the trustees. I assume that the commissioners acted.

6. On the 4th February, 1833, the power of dissolution was exercised, and the corporation was dissolved in terms of the charter provisions, which did not go to the abolition of the trust. By this dissolution the lands vested in the Crown, not, in my judgment, as absolute owner, but as trustee—and the land remained, I think, subject to the trusts before alluded to.

7. On the 5th August, 1834, the 5th and 6th Will. IV., No. 11, was passed *inter alia* to regulate the affairs of the late corporation, the recital of that Act shews that the intention of the legislature was to enable the Governor justly to carry out the then existing contracts of the corporation, and only recites so much of the effect of the dissolution as is relevant to that object. The Act then proceeds to vest in the Crown all debts, mortgages, stock, &c., of the corporation which had not so vested by the operation of

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the order in Council dissolving the corporation, and although the words used in the Act might be large enough to include the lands of the corporation which had already vested in the Crown, and although the words in the Act seem to declare that stock, debts, mortgages, &c., had already vested in the Crown, which I think had not before the Act so vested, still the Act does not seem to me to affect the lands granted to the corporation, because they had already vested in the Crown, and I think the legislature only intended to do what was necessary, viz., to vest in the Crown, stock, mortgages, &c., which had not by the operation of the dissolution vested in the Crown. I think, therefore, that this Act did not disturb the trusteeship of the Crown which was previously created, but only cast additional duties on the Crown, and transferred to it additional property.

8. On the 22nd June, 1842, the 5th and 6th Vic., cap. 36, was passed, for regulating the sale of the waste lands of the Crown. The 3rd section of this Act gives a certain prospective power of reserving lands for certain purposes, "or for any other purposes of public safety, convenience, health, or enjoyment."

9. The 23rd section defines waste lands to be "lands vested in the Crown" (that is, absolutely vested and not held in trust), and which had not been already granted, or lawfully granted to any person or persons in fee simple or for an estate of freehold, or for a term of years, and which had not been dedicated or set apart for any public use.

10. If the lands in question had been waste lands, I should think that the reserving power in sect. 3 would not justify their reservation as church and school lands; but to bring the lands within the operation of that Act, or of the Constitution Act, they must be waste lands.

I think they are not waste lands, and that even if they do not fall within the description of lands which have been already granted, still they have been set apart for a public use, and for that use are now held by the Crown in trust.

11. The term public use is not, in my opinion, to be limited to the class of cases defined by the 3rd section. It follows, therefore, that in my opinion the moneys and lands are not a part of the consolidated revenue of the colony.

J. B. DARVALL, Solicitor General.

17 December, 1856.

No. 7.

OPINION OF W. M. MANNING, Esq., ATTORNEY GENERAL.

I entirely concur in the opinion given by the Solicitor General (Mr. *Darvall*), which confirms, as will be seen, that given by the late Attorney General, Mr. *Plunkett*, and myself, as Solicitor General, on 6th December, 1846, and is opposed to that lately given by Mr. *Martin* and Mr. *Lutwyche*, whilst Attorney and Solicitor General.

2. Upon minute examination of the documents and Acts of Council bearing upon the question many further arguments suggest themselves, which support the result at which he has arrived; of these I will only mention the following:—

The Act of 5 Will. IV., instead of declaring that the lands and other property of the late corporation shall be dealt with as ordinary lands and property of the Crown, makes special provisions for their management by the Governor and by an agent to be appointed expressly for that purpose. This implies that these lands and property were not to be regarded as being

identical in tenure and destination with the lands and property absolutely vested in the Crown for general public uses. The provisions in question even go the length of giving to the agent the powers of a bailiff for preventing intrusion, &c., "in respect of lands of the said corporation which are now vested in her Majesty;" although the legislature had in the immediately preceding year provided "for the protection of the 'Crown lands' of the colony," by authorizing the appointment of commissioners, and giving to such commissioners powers *in respect of Crown lands*, precisely similar to those so given to the agent of the church and school lands. Had the lands been regarded as "Crown lands" in the general sense of the term, the legislature would have left them, in common with other lands, to the protection of the commissioners. It is also to be observed that, although the term "Crown lands" had a known and recognised meaning, and had been adopted by the legislature in the Act 4 Will. IV., No. 10, it is entirely avoided in the Act for regulating the affairs of the corporation.

W. M. MANNING, Attorney General.

17 December, 1856.

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No. 8.

OPINION OF EDWARD WISE, Esq., SOLICITOR GENERAL.

I have perused the several opinions herein, and I agree with Messrs. *Plunkett, Manning, and Darvall*, that the lands in question are not waste lands within the 5th and 6th Vic., cap. 36.

Had the question been put, prior to that Act,—Are these lands dedicated and set apart for some public use? I cannot doubt that the answer would have been in the affirmative; and, if so, what is there in that Act to alter their character? The definition in section 23 is altogether independent of the powers given by section 2 to dispose of waste lands otherwise than by sale in future; and I do not think that the powers given by section 2 can limit the wider meaning of the words in the 23rd section.

This opinion is supported, I think, by the 5th and 6th Vic., cap. 36, section 20, which enacts, "that nothing therein contained shall affect or be construed to affect any contract, or to prevent the fulfilment of any promise or engagement made by or on behalf of her Majesty with respect to any lands situate in any of the said colonies, in cases where such contracts, promises, or engagements shall have been lawfully made before the time at which this Act shall take effect in any such colony."

Now the original charter provided, "that the lands which should revert to the Crown, should be held, applied, and disposed of by the Crown in such manner as to the Crown should appear most conducive to the maintenance and promotion of religion and the education of youth in the colony." It might, therefore, be held, without any strained construction, that there was a promise or engagement with respect to church and school lands, which would exclude them from the operation of the Act.

A further argument in support of this view is, I think, derived from the circumstance that the Orphan School estates were, by virtue of the 7th George IV., No. 4, vested in the corporation (clergy and school trustees) at the time of its dissolution. And, if the words waste lands include the latter, it would necessarily follow that they would include the former, which would be such an act of gross injustice, that nothing but the clearest enactment could legalize.

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On the whole, therefore, my opinion is, that the church and school lands are not "waste lands" within the 5th and 6th Vic., cap. 36.

E. WISE, Solicitor General.

7 July, 1857.

No. 9.

OPINION OF MR. SOLICITOR GENERAL LUTWYCHE.

1. I have perused, with the attention which the importance of the subject demands, the several opinions of Messrs. *Darvall*, *Manning*, and *Wise*, on this matter; but, with all the respect which I entertain for the legal attainments and abilities of those gentlemen, I am bound to say that their reasoning has failed to convince me that the clergy and school estates are not waste lands of the Crown, and that I, therefore, still adhere to the opinion given by the present Attorney General and myself on the 2nd of October, 1856.

2. Mr. *Darvall's* opinion appears to be chiefly based upon the assumption that a trust and power are, if not absolutely identical, so closely allied as to be convertible terms. I apprehend, however, that they are essentially distinct, and that a Court of Equity could not act against a corporation—much less as against the Crown—enforce any particular mode of dealing with the lands in question under provisions similar to those of the 36th clause of the charter. By the terms of that clause it was stipulated that if the Crown thought fit the corporation should be dissolved, and that thereupon the land should revert to and become absolutely vested in the Crown (subject to existing contracts or mortgages), to be held, applied, and disposed of by the Crown in such manner as to the Crown should appear most conducive to the maintenance and promotion of religion and the education of youth in the colony. Such a clause did not define and create a trust in its legal sense, which is the only sense in which jurists can deal with it, but conferred a discretionary power, the exercise of which no one could ever have called in question, even if it had been exerted to effect objects very remote indeed from the maintenance and promotion of religion and the education of youth in the colony.

3. The instances in which the Queen may be a trustee of lands, though even then she would not be compellable to execute the trusts, seem to be confined to cases in which she takes land derivatively, as by descent, or by forfeiture from a trustee. She is also considered to be a *quasi* trustee in the case of a lunatic. But the general rule of law is, that the Crown cannot be a trustee for anyone, and I think that this rule applies with peculiar force to lands which revert to the Crown on the dissolution of a corporation, because it has failed to carry out the objects for which it was created.

4. I think that the 3rd and the 23rd clauses of the Act 5 and 6 Vic., cap. 36, must be read and construed together in order to give effect to the other portions of the Act. The preamble recites the expediency of establishing an uniform system of disposing of the waste lands of the Crown. The second section enacts that no such lands shall be alienated except by sale, and the third section proceeds to except from the operation of the preceding clause lands required for public uses. Among these it specifies sites of places of public worship or schools, and by that very specification excludes, in accordance with a well known rule of construction, lands which may be required as an endowment for such places of public worship or schools, when built. The words "set apart for some public use" in the interpretation clause appear to be a compendious form of expressing the public uses enti-

merated in the 3rd section, for although the operation of that section is prospective, while the 23rd section is retrospective in its effect, I shall be slow to believe that the Imperial Legislature meant to open up so wide a field for litigation as the larger construction, which Mr. *Darvall* has contended for, would present. It would be very difficult indeed to say what "some public use" would not include.

5. The Act 5 Wm. IV., No. 11, bears entirely upon matters arising out of the dealings of the lately dissolved corporation, with the exception of the clauses relating to the agent's authority; and, I think, that very little weight is due to the argument derived from his separate appointment. That might have been determined on simply as an administrative arrangement.

6. The 20th section of the Act 5 and 6 Vic., c. 36, does not seem to me to touch the present question. To or with whom has any promise, contract, or engagement been made or entered into since the dissolution of the corporation? Doubtless a general impression and understanding prevailed that the revenues of the church and school estates would be applied for religious and educational purposes; but the question is, whether a legal promise has been given by the Crown, since the corporation was dissolved, to apply the revenues exclusively to those purposes. It has dealt with them in that manner, but there is no evidence of a formal engagement to that effect.

7. Upon the whole, therefore, I am of opinion that, upon the dissolution of the corporation, the church and school estates vested absolutely in the Crown; that, at the time of the passing of the Act 5 and 6 Vic., c. 36, these lands had neither been granted nor contracted to be granted to any person, and had not been set apart for any public use; that they were consequently then waste lands of the Crown; that as such they could only have been since legally alienated by way of sale, or by grant for some of the public uses specified in the 3rd section of that Act; and that all revenue derivable therefrom forms a portion, under the existing Constitution Act, of the consolidated revenue fund.

ALFRED P. LUTWYCHE, Solicitor General.

16 November, 1857.

No. 10.

THE LAW OFFICERS OF THE CROWN TO THE DUKE OF NEWCASTLE.

Temple, 17th January, 1862.

MY LORD DUKE,—We were honored with your Grace's commands, signified in Sir *Frederick Rogers*' letter of the 3rd instant, in which he stated that he was directed by you to enclose the copy of a despatch which had been received from the Governor of New South Wales, relating to the treatment of certain lands formerly belonging to the "Church and School Estates Corporation" (with its enclosures), and to request that we would furnish you with our opinion on certain questions of law on which it was expedient that the Governor should receive instructions.

That by a charter of 9th March, 1828, under the seal of the colony of New South Wales, a corporation of an exclusively Church of England character was established, under the title of "The Trustees of the Clergy and School Lands in New South Wales."

That it contained the following clause:—"XXXVI. And we do further will and ordain that it shall be lawful for us, our heirs and successors, by an order to be issued by us for that purpose, with the advice of our or their Privy Council, to dissolve and put an end to the said corporation, in case it shall appear to us, our heirs and successors, with the advice aforesaid,

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expedient so to do; and thereupon all the lands which may by us, our heirs and successors, be granted to the said corporation, shall revert and become absolutely vested in us or them, to be held, applied, and disposed of in such manner as to us, our heirs and successors, shall appear most conducive to the maintenance and promotion of religion and the education of youth in the said colony."

That to this corporation some hundred thousand acres of land appeared to have been granted at different times, but on the 4th February, 1833, it was dissolved, and those lands accordingly reverted to the Crown, subject to the understanding, pledge, or trust, embodied in the concluding words of the above quoted article of the charter.

That a local Act (5th Wm. IV., No. 11) was passed on the 5th August, 1834, to remove some difficulties in transferring the corporation property to the Crown, which Act, among other things, authorized the Governor (sec. 6) to grant, sell, or dispose of the lands granted to the corporation, provided that the purchase money was paid to an agent to be appointed by him for managing the property. The property was afterwards dealt with under that Act, as applicable to the general support of religion and education, though that object was not alluded to in the Act. That, in 1841, a system was adopted of letting out the lands for seven, fourteen, or twenty-one years, the object evidently being to secure some present revenue, without losing the gains ultimately derivable from the necessary increase in the fee simple value of the lands.

That in 1842, the Imperial Land Sales Act, 5 and 6 Vic., c. 36, was passed, providing (s. 2) that all waste lands should be dealt with by way of sale, reserving, however (s. 3), to the Crown the power of disposing of such lands, otherwise than by sale, for various specified purposes, and in general for any purpose "of public safety, convenience, health, or enjoyment," and "saving existing promises, engagements, and contracts." Section 20.

That waste lands were defined to mean (s. 23) lands vested in the Crown which had "not been already granted to any person or persons in fee simple, or for an estate of freehold, or for a term of years, and which have not been dedicated and set apart for some public use."

That finally, by the Act 18 and 19 Vic., c. 54, s. 2, subject to the same provision as to "contracts, promises, and engagements," the disposal of waste lands of the Crown in New South Wales was transferred to the colonial legislature.

That it was alleged that the lands, as at present managed, interfered with the progress of settlement, and the Assembly claimed that they should be treated as part of the "waste lands of the Crown" transferred to the legislature by the Act 18 and 19 Vic., and discharged from the obligation to perform any trust.

That Messrs. *Martin* and *Lutwyche*, the colonial Attorney and Solicitor General in 1856, held, and were followed by a majority of the Legislative Assembly in holding, that the church and school lands were simply "waste lands of the Crown," and that the leases under which they were then occupied (or at least those granted subsequently to the Land Sales Act, which prohibited the leasing of waste lands), were illegal, and that the Executive Government had no power, without a fresh Act of the local parliament, to apply their proceeds to the purposes of the alleged trust.

That, on the other hand, the English law officers in the time of Lord Russell,—almost the whole of the Legislative Council,—a respectable minority of the Assembly,—four colonial law officers, Messrs. *Plunkett*, *Manning* (now Sir *Wm. Manning*), *Darvall*, and *Wise*, and some of the

present ministry,—concurred in holding that the lands were not wastelands, and were properly administered under the existing law.

That the opinions of the colonial law officers would be found in the colonial parliamentary paper of 22nd May, 1860.

That it seemed probable that the House of Assembly, being one of the branches of the legislature constituted under 18 and 19 Vic., cap. 54, would pass resolutions declaring those lands to be "waste lands," and directing them to be treated as such.

That, under these circumstances, your Grace was desirous of obtaining our opinion on the following points:—

- (1.) Are the lands which formerly belonged to the church and school corporation, and on the dissolution of that body vested in the Crown, a portion of the wastelands of the Crown transferred to the legislature of New South Wales by the Imperial Act 18 and 19 Vic., cap. 54?
- (2.) What steps could be taken to obtain the judgment of a Court of law upon this question?
- (3.) Supposing these lands to be waste lands, what is the effect on existing leases or alienations heretofore made under the local Act 5 Wm. 4, c. 11?

That, having reference on the one hand to the claims of the Colonial Treasury (if any) on those lands, and on the other to the rights of the existing lessees or grantees, to the nature of the trust (if any) imposed on the Crown by the 36th clause of the charter, to the equitable interests (if any) of the institutions which benefitted by that trust, and to the circumstance that by the local Act the management of the lands was conferred on the Governor without the concurrence of his Executive Council (or ministry)—your Grace would be further glad to know whether the Governor or those acting under his authority would be liable to any legal consequences if, after a resolution of the House of Assembly declaring those lands to be waste lands of the Crown, he proceeded, with or without the advice of his Government, either on the one hand to deal with the lands as they were then dealt with, or to treat them as waste lands (paying the proceeds to the proper Colonial Department, for the use of the Colonial Treasury), or to impound the annual receipts and stay the issue of further leases or grants until the question should be settled by an Act of the Legislature, or a decision of a Court of law?

And generally, what course would we advise the Governor to pursue on the passing of such a resolution?

In obedience to your Grace's commands, we have taken this matter into consideration, and have the honor to report—

That, we are of opinion that the lands which formerly belonged to the church and school corporation do not constitute a portion of the waste lands of the Crown, transferred to the legislature of New South Wales by the Imperial Act 18 and 19 Vic., cap. 54.

The waste lands of the Crown transferred by that Act are, in our opinion, the same which are defined by the 23rd section of the prior Act 5 and 6 Vic., cap. 36. That definition excludes all lands which, before the 22nd June, 1842, had been "dedicated and set apart for some public use." And we conceive the real question in this case to be, whether the lands in question had been, in fact, dedicated and set apart for any public use before that date?

We cannot agree with the suggestion made by Messrs. *Martin* and *Lutwyche*, that the words "some public use," in this section, ought to be

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construed with reference to the 3rd section of the same Act; so as to exclude all public purposes not *ejusdem generis* with those mentioned in that section. The general expression, "some" (or any) "public use," does not occur at all in the 3rd section; and there is nothing to limit its generality in the 23rd, where it does occur. The fact that there were already lands of large extent dedicated to the general purposes of religion and education, might very possibly be itself a reason for not taking power to make any provision for the same purposes.

The material facts are, that by the charter of 1826 the lands in question had been dedicated to particular public uses, subject to a power reserved, not to the Crown *simpliciter*, but to the King in Council, to dissolve the corporation, and revest the lands in the Crown, "to be held, applied, and disposed of, in such manner as should appear most conducive to the maintenance and promotion of religion and the education of youth in the colony." This power was exercised in 1833; and, under various orders of the Crown, signified to successive Governors in the usual manner between that date and the passing of the Act of 1842, the appropriation and dedication of these lands, and their proceeds, to the purposes of religion and education in the colony, was uniformly recognized and acted upon; and continued so to be when the Act of 1842 passed.

We cannot, under these circumstances, hesitate to express our entire agreement with the opinions given by the colonial Judges in 1831; by the English law officers in 1839; and by all the colonial law officers, except Messrs. *Martin* and *Lutwyche*, since 1842; to the effect that these lands were, on the 22nd June, 1842, already "dedicated and set apart for a public use;" and were, therefore, not within the definition of waste lands of the Crown contained in the section above referred to.

We think it proper to add (with reference to some other points suggested by the report of the Select Committee of the Legislative Assembly of New South Wales, dated the 24th April, 1860), that we entertain no doubt of the legal validity of the charter of 1826, and of the order in Council of 1833, founded thereon; and that we cannot adopt the construction of the 50th section of the New South Wales Government Act (18 and 19 Vic., cap. 54, schedule 1), which is stated in the same report to be as contended for by Mr. *Plunkett*. That section relates only to "territorial, casual, and other revenues of the Crown, from whatever source arising, within the said colony." If the lands in question were held by the Crown upon a public trust, for the purposes of religion and education, it is clear that they were not "revenues of the Crown," within the meaning of that section. A civil "list" is to be accepted "instead of" the "revenues of the Crown" referred to, which clearly shews that the "revenues" intended are revenues which the Crown, but for such arrangement, might rightly have taken for its own benefit.

The only means which occur to us of obtaining the judgment of a Court of law upon the question, are such as might be afforded by proceedings in ejectment, in the name of the Crown, against a lessee of some part of these lands, founded upon a notice to quit, which, if the opinion of Messrs. *Martin* and *Lutwyche* were correct, would entitle the Crown to recover—no lease of waste lands of the Crown in the colony, granted since the 22nd June, 1842 (unless by virtue of some prior contract or engagement), being valid in law. Leases made before that date, or afterwards made under prior contracts, as well as all alienations confirmed by the colonial Act (5 Wm. IV. cap. 11), are under any circumstances valid.

We think that it is competent for the Governor, without any risk (if authorized by the home Government so to do), to impound the annual receipts of these lands, and to stay the issue of further leases or grants until the question may be settled by an Act of the legislature, or by a legal decision. We do not think that a mere resolution of the House of Assembly would have any legal effect; and, we are of opinion, that the Governor would not be liable to any legal consequences, if he should, notwithstanding such a resolution, continue to deal with these lands as they are at present dealt with. If, on the other hand, he should treat them as waste lands, and apply their proceeds to general public purposes, it is possible that, by information in the colonial Court of Equity, such a misappropriation might be corrected. But we do not think that, if he acted under orders from the Crown to that effect, he would be subject to any personal responsibility.

In the event of such a resolution being passed, we humbly conceive that it would be very expedient to have the matter settled by legislation, and placed beyond the reach of controversy, without any unnecessary delay, as was done in the parallel case of the Canada Clergy Reserves, and that, in the meantime, the Governor should either continue to deal with the lands as they have been hitherto dealt with, or should (as far as may be without injustice to individuals) impound the proceeds, and stay the issue of further leases or grants.—We have, &c.,

WM. ATHERTON.
ROUNDELL PALMER.

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LEVY *against* SMITH.

December 6.

DECLARATION on an overdue promissory note for £287 8s. 1d., made by the defendant in favour of *Spencer Ashlin*, and by him indorsed to the plaintiff, and not paid by the defendant. A second count for another overdue promissory note for £251 17s. 3d.

First plea to both counts—that after the passing of the 5 Vic., No. 9, and before, &c., the defendant being a debtor resident at Nerrigundah, &c., within the meaning of the said Act, did, in pursuance of and according to

Declaration
on a promis-
sory note by
indorsee
against maker.
Plea, that the
defendant as-
signed all his
estate to trus-
tees in ac-
cordance with
the provisions
of the 5 Vic.,
No. 9, for the
benefit of all

his creditors—all of whom were duly named in a schedule annexed to the assignment deed, with the amounts due from the defendant to them respectively (save only as hereinbefore mentioned); and that the note sued upon was made and delivered by the defendant before the execution of such assignment, and that the defendant was not otherwise liable upon it. Averment, that the actual holder of the note was, at the time of the execution of the assignment deed, unknown to the defendant—which fact, together with the amount of the note and the name of the last known holder of the same, to wit, W. D., were duly stated in the schedule, and that the date when the note fell due, and the names of the immediate parties thereto, were, at the time of the said execution, unknown to the defendant. The plea then alleged the due fulfilment of the directions of the 34th section, and stated that the assignment deed contained a release of all debts, &c., mentioned in the schedule. Held, on demurrer, that the omission to state in the schedule the names of the parties to the note, or the date of its falling due, deprived the plaintiff of the benefit of the 35th section, and that the plea was no answer to the action.

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the provisions and in terms of the said Act, duly execute a conveyance and assignment by deed of all his estate and effects whatsoever to *John Frazer* and *Arthur Hill Coutes Macafee*, trustees for the benefit of all his creditors—all of whom were duly named in a schedule annexed to the deed, and therein called the first schedule thereto, with the amounts due from the defendant to them respectively; that both the said promissory notes in the said counts respectively mentioned, were made and delivered by the defendant before the execution by him of the deed, and the same respectively were at the time of the said execution of the deed current debts and outstanding, and the amounts thereof respectively owing and growing due from the defendant to the then holder or holders thereof; and that he never incurred or contracted any liability upon or for or in respect of the said promissory notes, or either of them, except by the said making and delivering of the same respectively, before the execution of the said deed. It then alleged, in the terms of the 34th section, that there was duly annexed to the deed a true and particular account, &c., and that the said deed was duly executed before the commencement of this action by the defendant and the said *John Frazer* and *Arthur Hill Coutes Macafee*, as such trustees respectively as aforesaid, and by four-fifths in number and value of the creditors of the defendant, within the meaning of the said Act. It then averred, in the words of the same section, that the said deed was so executed, &c., in the presence of a justice of the peace of the said colony, who duly attested the said execution thereof, by, &c., and that a notice of the same attested, &c., was published in the *Gazette*, &c. It then alleged that the deed, accompanied by a copy of the said account of the property of the defendant annexed thereto, was within the like period of fourteen days next after such execution thereof as aforesaid, duly registered according to law; that in the said deed was contained a release or provision whereby each and every of the creditors of the defendant released the defendant and his future estate and effects whatsoever and wheresoever of

and from the several debts respectively mentioned in the said first schedule to the said deed, and every part thereof respectively, and all and all manner of action and actions, &c., which the said creditors or any or either of them then had, or which they or any or either of them might, at any time have, &c., on account of the said several debts respectively specified in the said first schedule to the said deed.

There was a second plea in the same terms with the additional averments—"that the actual holder or holders of the said promissory notes, and each of them, was and were, at the time of the execution of the deed, unknown to the defendant—which facts, together with the amounts of the promissory notes and the name of the last known holder of the same, to wit, one *William Douglass*, were duly stated in the first schedule ; and that the respective dates when the said promissory notes fell due, and the names of the intermediate parties thereto respectively, were, at the time of the execution of the deed, unknown to the defendant.

Demurrer to the second plea and joinder.

Replication to the first plea—that all the creditors of the defendant were not named in the said schedule annexed to the said deed in the said first plea mentioned, as alleged, in this, that at the time of the making of the said deed the plaintiff was the holder of the said notes herein declared on, and the said plaintiff was not named in the said schedule.

Demurrer and rejoinder.

Rejoinder to the said replication—that the actual holder or holders of the said promissory notes, and of each of them, was and were, at the time of the execution of the said deed, unknown to the defendant—which facts, together with the amounts of the said promissory notes and the name of the last known holder of them respectively, to wit, one *William Douglass*, were duly stated in the said first schedule, and that the respective dates when the said promissory notes respectively fell due, and the names of the immediate parties thereto

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respectively, were, at the time of the execution of the said deed, unknown to the defendant.

Demurrer and joinder.

Sheppard in support of the demurrer to the second plea and the second rejoinder, and the replication to the first plea. The plea is bad; it does not allege that the schedule of creditors annexed to the assignment deed contained the names of all the creditors of the defendant, the assignor. The proviso to sect. 33—that as to debts due on any outstanding bills or notes (the holder of which shall be then unknown), it shall be sufficient if that fact be stated in the schedule with the amount, and the date when the same shall fall due, to give the name of the last known holder and the names of the immediate parties thereto, does not apply to deeds of release taking effect under sect. 35. The former section discharged the debtor from arrest, if he fulfilled the terms of the proviso. But the 35th section provides that the deed must be signed "by not less than four-fifths in number and in value of his creditors," and that when executed it shall bind all creditors "named in such schedule, whether assenting or not;" and therefore the deed must be executed by four-fifths of the whole body of creditors, and it then will bind all those named in the schedule. But even assuming that the proviso of the 33rd section is applicable to deeds executed under the 35th section, the schedule does not mention "the date when the same will fall due," or "the name of the last known holder," as is therein required. The rejoinder is a departure, for the plea alleges that all the creditors are named in the deed; and the replication set up an excuse for some not having been named, and thus endeavours to support the plea on a different ground.

Stephen in support of the second plea, and the demurrer to the replication to the first plea. The replication raises an immaterial issue, as the deed is valid notwithstanding the alleged omission. The statute should be reasonably but liberally construed. Under

sect. 23 the names of the actual holder is to be given when it is known; but, otherwise, it is sufficient to give the name of the last known holder. How can it be material to state the date of the note? In *Reeves v. Lambert* (a) it was held that it was sufficient for an insolvent debtor to insert in his schedule the best description he could give of the person to whom he was indebted, under the similar provisions of the 1 G. IV., c. 119, s. 6. [*Wise*, J., referred to *Levy v. Horne* (b).] That deeds of this kind are not to be invalidated by mere defects in matter of form, is shown by the 36th section. *Lambert v. Hall* (c), *Hoyles v. Blore* (d), and *Maile v. Bays* (e) were referred to. He also cited *R. v. Lyons* (f) as to the construction of statutes.

Sheppard in reply. If the defendant has not complied with the conditions imposed on him, he is not entitled to obtain the benefit contemplated by the enactment. *Lambert v. Smith* (g) shows that under the 1 and 2 Vic., c. 110, the debtor is bound, if he does not know the name of the holder of a negotiable security upon which he is liable, to describe him in his schedule in as full and correct a manner as he can. [*Stephen*, C. J. In that case the insolvent did not state what he knew, or what the statute required.] The colonial statute expressly requires that the schedule shall contain the date when the bill or note shall fall due, and the name of the last known holder; and these conditions have not been fulfilled. He referred to *Dell v. King* (h), and the decision of this Court in *Threlkeld v. Cooper* (i).

STEPHEN, C. J. The question raised by this demurrer is whether the plaintiff is deprived of his right to recover on these two promissory notes by the deed of assignment executed by the defendant, under the provisions of the 5 Vic., No. 9—it being alleged that the

(a) 4 B. & C. 214.	(b) 5 Exch. 257; 19 L. J. Ex. 268.
(c) 9 C. & P. 508.	(d) 14 M. & W. 387.
(e) 2 D. & L. 964.	(f) 28 L. J. M. C. 35.
(g) 11 C. B. 358; 20 L. J. C. P. 195	(h) 33 L. J. Ex. 47.
(i) 27 June, 1860.	

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schedule to the deed omitted to state the names of the parties to the notes, or the date of their falling due—the defendant, so it is averred, not knowing either of these particulars at the time of his assignment; and I am of opinion that the omission of these two particulars deprives the defendant of the benefit of the thirty-fifth section of the Act. It would probably not have been necessary to name the plaintiff in order to come within that section. But here the creditor is not indicated, nor his debt identified to the extent required by the statute. If the debtor cannot give the name of the last holder, or of the intermediate parties, or the date when a promissory note will fall due, it may be that the legislature intended that he shall not have the benefit of the Act. There may be very good reasons why the legislature should require these particulars. As the schedule does not contain the plaintiff's name, or anything to indicate it, or the names of the intermediate parties, or the dates of these notes, I am of opinion that the deed does not bind the plaintiff.

WISE, J. If it were necessary to decide the point, I should think that the meaning of the word "named" is denominated. The question, however, is whether the provisions of the 33rd section have been complied with in this deed, when the schedule does not give the name of the holder of these notes, or when they fell due. The statute does not say that there is to be a description of creditors as near as may be, but it provides specifically that the amount of the note and its date shall be given. That has not been done, and the plaintiff therefore is not deprived of his right to recover. We do not decide that the deed is invalid, but only that this particular creditor is not bound. The debtor should know when his bills are due.

Judgment for the plaintiff.

OSBORNE *against* RUDD and another.

TRESPASS on a run. Pleas, not guilty and not possessed (a). Issue thereon.

At the trial before *Wise*, J., in November, 1863, it appeared that the defendants were jointly interested in a station, but that the cattle on it were their separate property—each defendant had his own distinct herd and stockyard, with different brands and stockmen. The separate herds, however, intermixed habitually on the joint land and ran together. Although they were kept separate when tailing, when grazing they were one herd, and as one united herd they committed the alleged trespasses. Each defendant also had in the neighbourhood a distinct and separate station, where their cattle were wholly distinct, and there was no intermixing unless casual. But the cattle which trespassed came from the joint land.

The learned Judge ruled that under such circumstances the defendants were not jointly liable, but that a separate action must be brought against each.

The *Attorney General* now moved for a rule *nisi* for a new trial, on the ground of misdirection.

Darley showed cause. Where *A.* and *B.* are separately interested in cattle which trespass, *A.* and *B.* are separately but not jointly liable. When an action has been brought against several joint trespassers, the evidence must be confined to the joint offence in which all are implicated; *Addison* on Wrongs (b). To succeed in an action of trover against several defendants, there must be proof of an act in which all the defendants can be so connected together as to make one joint act of conversion by them; *Nicoll v. Glennie* (c). And for this reason, in an action of trespass and expulsion against

A. and *B.* were jointly interested in a station, but the cattle running on it were their separate property; each of them had his own distinct herd and stockyard, with different brands and stockmen, but the separate herds intermixed habitually on the joint land, and ran together. Held that *A.* and *B.* were not jointly liable for the trespasses of their respective cattle.

June 16.

(a) There were other pleas, to which it is unnecessary to refer.
(b) p. 736. (c) 1 M. & S. 588.

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three, with a count for imprisonment—the trespass and expulsion having been proved—Lord *Lyndhurst*, C.B., would not allow the plaintiff to give evidence of an imprisonment by one of the three defendants, or to abandon the trespass and go on for the imprisonment; *Tait v. Harris* (a). Otherwise, some of the defendants might be made liable in damages for a trespass in which they had no part or concern, as each would be liable for the whole damages. [Stephen, C. J. In an action of trespass by cattle—if they are being driven, the ownership is immaterial, because who ever drives them is liable; if the cattle are straying, the owner is responsible; the question here is, who is the owner?] *Sedley v. Sutherland* (b), *Lindley* on Partnership (c), and the notes to *Coryton v. Lithelby* (d) were referred to.

The *Attorney General* and *Darvall*, Q. C., contra. The defendants are both liable; first, because as the land on which the cattle run is their joint property, they are jointly agisters each to the other of the entire herd, and an agister is clearly liable for the straying of the cattle in his charge. It is laid down in one case that if the beast of *A.*, which is agisted by *B.*, trespass in the close of *C.*, it is in the election of *C.* to bring an action of trespass against *A.* or *B.* (e); and the same will be found in *Comyn's Digest*. (f). And secondly, because there was here a joint acting by the two. [Stephen, C.J. Was it not the separate action of each by the separate assent of the other?] Each meant the cattle to graze indiscriminately; each knew that they would feed and wander together, and profited by the joint trespass, and approved of these trespasses. The nature and number of the cattle, and the nature of the colony must be looked at. If separate owners cause their cattle to intermix, so that strangers cannot distinguish one from the other, and so place them that the mixed herd unitedly would probably trespass, the joint liability attaches. The defendants are estopped from disputing the inference and

(a) 6 C. & P. 73.

(b) 3 Esp. 203.

(c) 1 Vol. 401.

(d) 2 Wma. Saund. 117 b and c.

(e) 7 Bac. Ab. 689.

(f) 7 Vol. 498, Tit. Trespass, C.I.

the liability implied by law from their conduct. *Pickard v. Sears* (a), *Gregg v. Wells* (b), *Freeman v. Cooke* (c), and *Chitty on Pleading* (d) were referred to.

STEPHEN, C. J. I am of opinion that here there was a separate ownership, and that therefore the action should have been brought separately against each owner. A man cannot be an agister of his own cattle, so as to make himself responsible in that character, if he be not so as general or ultimate owner. There was no joint act by the defendants; but each is responsible for the act of his own cattle.

MILFORD, J., concurred.

WISE, J. The foundation of the liability in trespass is, that there is a duty on the owner to take care of his cattle. But neither of these defendants had any control over the other's cattle, or was under any duty to take care of such cattle. I am of opinion that the defendants are not jointly liable. There is no hardship in the case, because it was known that the cattle were not joint property. The present is not a decision that under no circumstances can persons be liable for cattle of other persons running on their stations; for it might be shown that they authorised, and not merely permitted such cattle thus to run, as was pointed out in *Robinson v. Vaughton* (e)—“If I give,” said Alderson, B., “a man leave to go on a field over which I have no right, and he goes, that will not make me a trespasser; but if I desire him to go and do it, and then he does it, that is a doing of it by my authority, and I should be liable.” The former is a mere leave and license—the latter is an authority. Whether a person who sends cattle to agist is liable in trespass, I have some doubt.

Rule discharged.

(a) 6 A. & E. 474.
(c) 2 Exch. 662.

(e) 8 C. & P. 252.

(b) 10 Id. 97.
(d) 1 Vol. 93.

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December 17.

RICHARDS *against* WHITFORD.

Trespass,
*quare clausum
 regit.* Plea,
 not possessed.
 Replication
 under the
 28th section
 of the Crown
 Lands Occu-
 pation Act of
 1861, that
 on the 18th
 December,
 1860, *G. B.*
 being then an
 agent of the
 Crown in that
 behalf law-
 fully auth-
 orised, did
 promise,
 engage and
 contract with
J. S. A., for
 the granting
 to him, under
 the orders in
 Council re-
 ferred to in
 the Lands
 Occupation
 Act of 1861,
 for a term
 which, at the
 time of the
 trespasses,
 was and still
 is unexpired,
 of a lease of
 the *locus in quo*
 —and the said
J. S. A. en-
 tered into the
 possession of

the said land, and after such entry—and during the said term the plaintiff purchased from the said *J. S. A.* all his right, title, and interest in the said land, and the same was, with the sanction of the government, duly transferred to the plaintiff by a document dated 13 November, 1851, under the hand of the said *G. B.*, then being such duly authorised agent as aforesaid, and the plaintiff entered into possession of the land in such transfer mentioned. *Held* bad on demurrer, for not alleging that the land was Crown land, of which there was no lease in force.

(a) The replication, as originally drawn, did not contain the averments placed between brackets; and having been demurred to, was held (September 6) bad for not alleging an entry. But the plaintiff had leave to amend within four days upon payment of costs.

the party relying upon the clause, therefore, must state it with the exception; *Vavasour v. Ormrod* (a), *Steel v. Smith* (b). The replication is also bad for not accepting an issue properly tendered by the plea, although that issue is material. The matter relied on in the replication, if an answer to the plea, can be given in evidence under that issue (c). Under the old system, to a plea like the plea of not possessed, which concluded to the country, the replication was the common or special *similiter* (d). [Stephen, C. J., referred to *Jones v. Chapman* (e).] And the 28th section of the Crown Lands Occupation Act of 1861 (f), which provides that a party to an action of trespass may plead and put in evidence any promise, &c., made by the Crown, or its lawful agent, does not enable the plaintiff to plead an illegal replication. That section can only require that, as in cases of estoppel, it shall be pleaded when there is an opportunity of pleading it, according to the recognised rules. If the replication can be considered as in confession and avoidance, it is bad as a departure, for it does not support the declaration. [Stephen, C. J. It only shows why and under what authority the plaintiff is possessed. May not the plaintiff reiterate his assertion of possession?] The plaintiff confesses that he is not possessed, and endeavours to avoid that defect in his title to sue, by alleging that he is entitled to such possession; but the declaration alleges that he is in an actual possession. If the replication is true, the plaintiff should bring ejectment and not trespass, as it is clear that the owner of, or person legally entitled to, land cannot maintain trespass before entry; *Turner v. Cameron's Coalbrook S. C. Co.* (g), *Litchfield v. Ready* (h), *Barnett v. Earl of Guilford* (i). Lastly, the replication is bad for not alleging that the lands in question are Crown lands.

Isaacs in support of the replication. If the plaintiff cannot avail himself of the benefit conferred by the

(a) 6 B. & C. 430.

(b) 1 B. & A. 94.

(c) See Stephen Pl. ch. 2, sect. 1, R. 3.

(d) 3 Chitty Pl. 624.

(e) 2 Exch. 803.

(f) 25 Vic., No. 2.

(g) 5 Exch. 932; 20 L. J. Ex. 71. (h) 5 Exch. 939; 20 L. J. Ex. 51

(i) 11 Exch. 19; 24 L. J. Ex. 283.

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statute without placing his title on the record, it is submitted that the statute enables him to do so. If the Court thinks that the facts relied on are admissible under the plea of not possessed, the plaintiff will be satisfied. Enough appears on the pleadings to show that no lease of these lands is in force, and that they are Crown lands.

Darley replied.

STEPHEN, C. J. The replication is clearly bad for not alleging that the land was Crown land, of which there was no lease in force. But it is not a departure; for in it the plaintiff says, "I assert, as I did before, that I am in possession, and I will show you why I am in possession—namely, because I got into possession under a lease from the Crown," and, therefore, it supports the declaration. And yet I am inclined to think, although it is unnecessary to give any decision on the point, that the replication is bad—on the ground that it is neither in confession and avoidance, nor a denial of the plea, but only a reassertion, and this not in any way meeting, or called for by, the defendant's plea of not possessed. If it is a statutory plea, the legislature could not mean that it is to be pleaded where it cannot properly be pleaded. A plaintiff might sue in ejectment on a promise of a lease by the Crown; but in such a proceeding the promise could not be pleaded, because there are no pleadings in ejectment, and yet it must have been intended that the plaintiff should get the advantage of it. A rule is required that in cases under this section the plaintiff may reply under it to the plea of not possessed, or give notice to the defendant that he intends to rely on it.

WISE, J., concurred.

DOLBY *against* THE BANK OF NEW SOUTH WALES. September 30.

THIS was an application in Chambers on behalf of the defendants, to stay all proceedings in the action, on payment of the amount claimed with interest, and of all costs (excepting the costs of the trial) which had terminated by the discharge of the jury, under special circumstances, by consent.

It was an action by a customer against the banker—the question being whether the defendants were entitled to debit the plaintiff's account with a particular cheque, which the plaintiff alleged to be a forgery. At the trial, the jury had been by consent of both parties discharged, at the suggestion of the Judge, before the twelve hours had expired, which are required by the statute—but after the expiration of above seven hours, it being stated that no probability existed of a verdict. The question was, whether the jury having been discharged under such circumstances, the finally successful party was or not entitled to his costs of the trial?

STEPHEN, C. J. The consent of the parties only anticipated the effect which would have been produced, by operation of law, at the expiration of a few additional hours; and it must be assumed, as the suggestion came from the presiding Judge, that the discharge at this earlier period was simply in ease of the jurors, to avoid their needless further detention. The effect of discharging a jury, under such circumstances, ought therefore to be the same as if the full legal time had been allowed to run out. In other words, both parties ought to be in the same position, as if the jury had been detained until the expiration of the twelve hours required by the statute. In such case we have decided (a)

Where at a trial the jury had been by consent of both parties discharged, at the suggestion of the presiding Judge, before the twelve hours had expired which are required by the statute, but after the expiration of about seven hours it being stated that no probability existed of a verdict, held that the finally successful party was entitled to the costs of the trial.

(a) KORFF *against* THE AUSTRALIAN STEAM NAVIGATION COMPANY.

In this case the question was, whether a plaintiff, succeeding finally in a suit, is entitled to the costs of an abortive previous trial,

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that the party finally succeeding is entitled to his costs of the abortive trial; and, therefore, the plaintiff here, as the successful party, is entitled to get his costs of the trial in question.

at which the jury were, after twelve hours, discharged under the statute, being unable to agree.

On the argument the following cases were cited:—*Burchell v. Ballamy*,* *Harrison v. Bennett*,† *Sealy v. Powers*,‡ *Waite v. Spurging* and *Bostock v. Staffordshire Railway*.||

STEPHEN, C.J. I have conferred on the question argued, and consulted the authorities with Mr. Justice *Dickinson* and Mr. Justice *Milford*. We are all of opinion that the case of an abortive trial—terminating, in this colony, by the discharge of the jury under the Act of Council—is more analogous to the case of a *remand*, or postponement *propter defectum juratorum*, than to that of a discharge of the jury by a Judge. For the latter is, in our opinion, on the implied assent of both parties; whereas, in all the other cases, the result is brought about by the act and operation of law.

Independently of this consideration, I am individually of opinion that the decision and rule in *Burchell v. Ballamy* are more consonant with justice and expediency than the decisions reported in the 3rd and 4th D. P. C., and the 21st Law Journal. It is desirable that both parties should feel it to be alike their interest to procure a verdict in the first instance; not that by throwing in any event the plaintiff's own costs of the first trial on him, the defendants' chances of success may be increased—nor that men should be deterred from becoming plaintiffs by the fear of pecuniary loss, even if successful.

* 5 Burr. 2093.

† 1 D.P.C. 627; S.C., 1 C. & M. 203.
§ 4 Id. 576.

‡ 3 D.P.C. 375.
|| 21 L.J.Q.B. 334.

Ex parte BRIGGS (a).

June 6, 15.

SALAMONS moved to make absolute a rule *nisi* for a prohibition, granted in Chambers by *Wise*, J., to restrain certain justices from further proceeding in respect of an order made by them on the information of *W. Geddes*, for the delivery of certain property—that is, a book containing the names of subscribers to the *Hunter River Advertiser*, to the said *W. Geddes*.

It appeared that *W. Geddes* was a bankrupt in Scotland, and that the applicant (Mr. *Briggs*) was the agent of the "trustee" of his estate, under the 19 and 20 Vic., c. 79, and had got into his possession the book in question as the property of the bankrupt; he produced before the justices the evidence of his parliamentary title—namely, the act and warrant of confirmation of the appointment of the trustee under the seal of the Sheriff Court of the county of Edinburgh, and certified by the sheriff clerk, and authenticated by one of the Judges of the Court of Session—and also a power of attorney from the trustee to the applicant. But the justices ordered that the book should be restored to *Geddes*. It is submitted that the justices were wrong, and the evidence of the title of Mr. *Briggs* was sufficient. The 73rd section provides that "such act and warrant in favour of the trustee, purporting to be certified by the sheriff clerk, and to be authenticated by one of the Judges of the Court of Session, shall be received in all Courts and places within England, Ireland, and Her Majesty's other dominions as *prima facie* evidence of the title of the trustee, without proof of the authenticity of the signatures, or of the official character of the persons signing, and shall entitle the trustee to recover any property belonging or debt due to the bankrupt, and to maintain actions in the same way as the bankrupt might

A copy of the act and warrant in favour of a trustee, appointed under the Bankruptcy (Scotland) Act, 1856, purporting to be certified by the sheriff clerk, and to be authenticated by one of the Judges of the Court of Session, is *prima facie* evidence of the title of the trustee to the goods of the Bankrupt, under the 73rd section of the Act, without proving the sequestration. (Milford, J., dissentient.)

(a) This case was argued twice—the first time before *Stephen*, C. J., and *Milford*, J.; but as they did not agree, it was re-argued before the three Judges.

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have done, if his estate had not been sequestrated." [*Stephen, C. J.* The 102nd section enacts that the act and warrant of confirmation "shall *ipso jure* transfer to and vest in him, absolutely and irredeemably," the right, title, and interest in the property therein specified.]

Windeyer showed cause. The bankruptcy, which is the foundation of the whole title of *Mr. Briggs*, was not shown. The sections referred to only show that these instruments shall prove themselves. [*Wise, J.* In *Perry's* case, I admitted the appointment of the official assignee as evidence of such appointment. *Milford, J.* Might not the sequestration be void for some reason, and yet this appointment might have been made?]

STEPHEN, C.J. I think the prohibition must go, and that the title of the person in possession (*Mr. Briggs*) was sufficiently shown by the production of the appointment of the trustee whom he represented, and that the justices were wrong in ordering him to give back the book which he was entitled to retain. It must be taken to be the property of *Geddes*, and that *Briggs* got possession of it. *Geddes* then went before the justices, and it was for *Geddes* to show his title. If *Briggs* had taken it from *Geddes* by trespass or by force, the burden of proof would have been upon *Briggs*; but even if it had been such case, I think that *Briggs* would have shown sufficient to entitle him to succeed. The 73rd section says, that the act and warrant shall be "*prima facie* evidence of the title of the trustee." But if it is necessary to prove the sequestration, this instrument would not be *prima facie* evidence. The section also says that it "shall entitle the trustee to recover any property belonging to" the bankrupt. This section and the 102nd seem to me to make this instrument conclusive evidence of *Briggs'* title.

MILFORD, J. I have the misfortune to differ from my learned colleagues, and to think that it was necessary to prove the sequestration. The 174th section shows how

the deliverance awarding sequestration shall be proved. It enacts that "all deliverances under the Act, purporting to be signed by the Lord Ordinary, or by any of the Judges of the Court of Session, or by the sheriff, shall be judicially noticed by all Courts, &c., and shall be received as *prima facie* evidence, without the necessity of proving their authenticity or correctness, &c." This section shows what shall be evidence of the sequestration. The 73rd section states what shall be evidence of the assignment; and shows that this act and warrant in favor of the trustee, is evidence of the title of the trustee without proof of the authenticity of the signatures; but it is evidence of nothing else. In my opinion, therefore, the sequestration should have been proved.

WISE, J. I am of opinion that under the 73rd section the production of this document is *prima facie* evidence of the title of the holder of the document to recover, in accordance with modern legislation and the later Bankrupt Acts, which limit the opportunity of disputing the bankruptcy, and that this particular document is within the section.

Rule absolute.

THE QUEEN *against* FINLAYSON.

September 2.

SPECIAL case reserved for the consideration of the Judges, under 13 Vic., No. 8.

At the late Quarter Sessions at Tamworth, *John Finlayson* was tried before me for horse stealing.

was driving a mob of horses when the horse in question, a distinctly branded one, joined the others—it being near the owner's run. It did not appear whether the prisoner (who was riding 200 or 300 yards behind, and having assistants a-head or at the side) saw at the time that this horse had joined his own horses. But the prisoner, the next morning, counted over (as his custom was) the horses, and then drove the whole on together to their destination. The Judge refused to tell the jury that, assuming this to be a case of finding, if when the prisoner first saw the horse with his mob, he did not form the design of conversion, he was not guilty of larceny; but he told them that if in such case, when the prisoner first did some act, or gave some direction by which he treated the horse as part of his mob, or incorporated it therewith, he did not form such design, he was not guilty of larceny. The jury found that it was a case of finding, and convicted the prisoner. Held that the direction was right.

On the trial of an information for larceny of a horse, it appeared that the prisoner

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Evidence was given that a week or ten days before, the horse (a distinctly branded one) was found in the prisoner's possession, some 70 miles further on the road to Queensland, it ran up to and of its own accord mixed with his mob of horses, with which it afterwards remained. This was near but not necessarily upon the owner's run ; and it was suggested by Mr. Simpson, on behalf of the prisoner, and admitted by me, that it was open to the jury to consider the case as one of finding marked and traceable property.

It was in evidence that the prisoner was at the time riding some 200 or 300 yards behind, and might possibly have seen the horse join the mob.

It was in evidence also that the prisoner, with one of his servants, counted over the horses before starting on the day's journey, every morning between that time and the time of his arrest.

Prisoner's counsel asked me to direct the jury (supposing they should consider the case one of finding), that if when the prisoner first saw the horse with his mob he did not form the design of conversion, he was not guilty of larceny.

This I refused to do—but I told the jury instead (supposing they should so consider) that if when the prisoner first did some act, or gave same direction by which he treated the horse as part of his mob, or incorporated it therewith, he did not, &c., &c., &c.

The jury held that the case was one of finding (the horse having been off his own run), and convicted the prisoner.

The question for the decision of the Supreme Court is, whether I was right or wrong in ruling, as above stated, as to time.

H. R. FRANCIS, (a)
Chairman of Quarter Sessions,
June 25, 1864. Northern District.

(a) It also appeared by the boy's evidence that he and an aboriginal were a-head of the horses when the horse in question came towards the mob, and that they endeavoured to prevent him joining the horses, but could not succeed ; also, that he did not, at any time, communicate this fact to his master, the prisoner.

Darley for the prisoner. The direction of the learned Chairman was wrong ; as the proper question for the jury was, whether at the time the prisoner found the horse he had the felonious intention. The law is concisely stated in *Christopher's Case* (*a*), where a person finds a purse of money on the high road, and appropriates it to his own use, the question for the jury is, whether he does it at the time of finding with a felonious intent, and that depends on whether at that time he knows who the owner is, or has the means of knowing him by reason of the marks on the article indicating the owner. But the finder is not guilty of felony, merely because (when afterwards learning who the owner is) he fails to make restitution and fraudulently retains the property. In this case the original taking was not felonious ; and it was no act of trespass. And *Riley's Case* (*b*) is therefore an express authority in favor of the prisoner. For, consistently with the direction of the learned Chairman, he may have had no felonious intention when he got possession of the animal. He referred to *Gardner's Case* (*c*), *Dixon's Case* (*d*), *Thurborn's Case* (*e*), and *Savigny on Possession* (*f*).

STEPHEN, C. J. It appears that the prisoner was driving a mob of horses, when the horse in question (a branded animal, the ownership, therefore, of which was ascertainable in the neighbourhood) joined the others—it being near the owner's run. Whether the prisoner (who was two or three hundred yards behind, having assistants a-head or at the side) saw at the time that this horse had joined his own horses did not appear. But it was proved that the next morning, as his custom was, the prisoner counted over the entire mob, and then drove the whole on together to their destination. The learned

On behalf of the prisoner, evidence was given that his left eye was an artificial or glass eye, and that he had been attended in gaol by Dr. *Scott*, for weakness of sight in the right eye. There was no direct evidence to shew at what time the prisoner first became aware of the horse's presence in the mob.—*H. R. Francis.*

(*a*) 28 L. J. M. C. 35. (*b*) 1 *Dears.* 149 ; 22 L. J. M. C. 48.
 (*c*) 32 L. J. M. C. 35. (*d*) 25 L. J. M. C. 39.
 (*e*) 1 *Den. C. C.* 338 ; 18 L. J. M. C. 144. (*f*) p. 148.

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Judge, in substance, told the jury that assuming this to be a case of finding, yet the prisoner need not have formed the intent to appropriate the animal at the moment of its junction with the others, or of the then continued driving onwards of the horses, but that it was necessary to show that such intent existed at the moment of taking. He left the question to them, therefore, whether the intent existed when the prisoner first did some act, or gave some direction by which he treated the horse as part of his own mob of horses, or incorporated it therewith. I am of opinion that this direction was right; and it seems to me doubtful whether the prisoner's case was one of finding at all. If it merely strayed, it was not lost, and could not therefore be found. But it appears that the next morning the prisoner counted the horses, and he therefore then saw this one among them, and determined to take possession of it. By the same act, he took possession and determined to appropriate it.

WISE, J., concurred.

Conviction sustained.

December 1.

Ex parte CORY.

A justice of the peace acting judicially, in the exercise of his summary jurisdiction, cannot refuse to hear any attorney who has been retained to conduct a case for a client as an attorney or advocate in the matter, because of insulting and contemptuous language used by such attorney on a similar occasion to another justice, or to the same justice, but on a former day.

(a) *Quare*—whether the provisions of this section were intended to apply to a case like the present?

justice might have refused to hear him. Neither is it necessary to enquire what might have the effect of an adjudication or judgment by the Bench, or any justice suspending the applicant, or silencing him for any specified time. But it is submitted that for previous misconduct in another case, and on another day, the justice had no such power as was exercised on this occasion. The applicant appeared as attorney for the complainant in the case in question, and had a right to be heard, under the 12th section of Sir John Jervis' Act, No. 2 (a); which, after providing that the place where the trial takes place shall be an open and public Court, enacts that the defendant shall be admitted to make his full answer and defence, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf, and that "every complainant or informant in any such case shall be at liberty to conduct such complaint or information respectively, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf." This refusal in fact obliges a complainant in any case pending before this justice, to employ another attorney, and is an infringement both of the right of the attorney and of his client.

Foster, for the justice, showed cause. The refusal by Mr. *Cory* to apologise for his former misconduct, was a continuing offence. "The proceedings of an inferior Court must be conducted subject to reasonable conditions and rules of practice. Every tribunal has power to establish and enforce the observance of such rules. Can it be said that a justice cannot adjourn for an hour? or a day? or refuse to sit at all in a particular case? If he can do this, why can he not refuse to hear a particular person altogether? It is submitted that a justice has power to imprison or fine for contempt in his presence, which leads to the obstruction of the administration of justice; and the Court can enquire whether the circumstances did constitute a contempt, as was done in *In re Pater* (b). But if so, must he not surely have the less

(a) 11 and 12 Vic., c. 43. (b) 33 L.J.M.C. 142.

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power of merely refusing to hear? [*Wise*, J. Before Sir *John Jervis*' Act, attorneys had no right to appear in summary cases; *Collier v. Hicks* (a).] The decision of his Honour Mr. Justice *Milford* (b), in Chambers, is distinctly in point in favour of the respondent. It is there laid down that Magistrates sitting to hear matters by statute placed under their jurisdiction, are holding a Court—and every Court, whether a Court of record or not, may commit to prison for contempts perpetrated in the face of it; and the rule for a mandamus was, under very similar circumstances discharged with costs. The complainant need not have been injured—for, as was said in that case, there is the whole bar and roll of attorneys open to his choice. Is not the power claimed incident to a Court of Petty Sessions? It is a principle of the common law that such powers are given as are necessary to the existence of such a Court, and the proper exercise of the functions it is intended to execute. Surely the law empowers it to protect itself from all impediments to the due course of its proceeding; *Kiely v. Carson* (c). In *R. v. Davison* (d), which was an indictment for a blasphemous libel, the defendant who conducted his own defence was fined by the presiding Judge, for misconduct in the course of his address to the jury. Having been convicted, he moved for a new trial. In refusing the rule, *Abbott*, C.J., said—"It is utterly impossible that the law can be properly administered, if those who are charged with the duty of administering it have not power to prevent instances of indecorum from occurring in their own presence." [*Stephen*, C.J. The case in which the misconduct of Mr. *Cory* had occurred was over. Courts of criminal jurisdiction have authority to order that no newspaper shall publish the proceedings in a pending case, till the case is over; and if pending the case and while the Court has jurisdiction over it, a newspaper disobeyed the order, the proprietor might be fined (e). Mr. *Walters* of the *Times*, was once fined £500 for disobeying an order of this kind, but it was

(a) 2 B. & Ad. 663. (b) April, 1859. (c) 4 Moore P.C. 89.
(d) 4 B. and A. 319. (e) See *R. v. Clement*, 4 B. & A. 218.

pending the case.] The decisions of *Cox v. Coleridge* (a), *Beaumont v. Barrett* (b), and *Fenton v. Hampton* (c) were referred to.

The judgment of the Court was now delivered by

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STEPHEN, C.J. This matter has so long stood over for judgment, not on account of its difficulty, but because (from the importance of the questions arising in it) we wished to look fully into the authorities, and deliver our opinion in writing after a review of them.

The complaint made by Mr. *Cory* is, that, he having been retained to conduct a case for a client, at the Sydney Police Office, in which the justice was sitting judicially, in the exercise of his summary jurisdiction, the latter refused to hear him as an attorney or advocate in the matter, because of certain alleged insulting and contemptuous language used by the applicant on a similar occasion to another magistrate—or, as it would seem, to the same justice, but on a former day. It was contended on the motion before us, that, as the statute (the 2nd of Sir John Jervis' Acts, c. 43, sect. 12) has given to every complainant or defendant the absolute right, upon summary proceedings before magistrates, of appearing and being assisted by counsel or attorney, the justice was bound by law to hear Mr. *Cory*; since the refusal to do so, would be either to violate the express terms of the enactment, or, in effect to compel his clients to select another advocate. On the other hand, it was insisted that justices of the peace had powers over all persons attending before them, far more extensive than that exercised in the present case; and that, if attorneys could not be visited for grossly offensive language on one occasion, by being silenced on all others until a proper submission was made, the necessary rules of decorum and propriety could not be enforced against practitioners.

We have referred to the numerous cases and dicta, to be found in the books on the subject of contempts, in a

(a) 1 B. & C. 37.

(b) 1 Moore P.C. 59.

(c) 11 Id. 347.

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view to the discovery of some principle which might embrace the particular question. And it is our desire, as it is our duty, to uphold the just authority of the magistracy, and support them, as far as may be, in their efforts to restrain the impertinence of manner, or licentiousness of tongue, which perhaps are found occasionally to disfigure proceedings before them. But the extensive powers (that, for example, of punishing contempts summarily by imprisonment and fine), which are by law conferred on Courts of record, and on their Judges while there presiding, do not, as a general rule, exist in tribunals of inferior grade. It has, indeed, been said, that every judicial tribunal possesses necessarily the power of punishing, by committal, such contempts committed in its presence, as tend directly to obstruct the exercise of its functions; and the immediate removal of which, therefore, becomes essential to their performance. Assuming such a power, however, to exist in justices of the peace, under such circumstances, it clearly must be exercised at the moment, after adjudication that there has been such a contempt. But the question here is of a different nature; and we must observe, in passing, that there is no case in which—though the point has been more than once raised—it has ever been held that justices possess the stated power.

It will by no means follow, that, if that large power (unlimited and unrestrained as it would be) does not exist, the magistrates are therefore without remedy. In case of any such grossly, improper, or insulting language, or indecorous conduct, in the face of the bench, as shall amount to a breach of that necessary degree of decency and order—without the observance of which, in judicial and magisterial proceedings, no tribunal could effectively secure to itself respect and obedience—the sitting justices or justice may, undoubtedly, for such contempt and misconduct, require the offender to enter into recognizances to a reasonable amount, and for a specified reasonable period, to be of good behaviour—and may commit him until such security shall have been given. The repetition of any similar contempt, during that

period, would of course be a breach of the recognizance. The offender in any such case, moreover, is clearly guilty of a misdemeanour at common law, and might be proceeded against by indictment, accordingly.

These remedies would appear to be sufficient, if cautiously pursued, and in a fitting case, for the admitted evil. But we entertain no doubt that any person offending, in the manner and to the extent supposed, and so that a repetition of such behaviour is reasonably apprehended, may also be forthwith removed from the room; and, if so, he may be kept out of or prevented from entering it during the remainder of the proceedings. For such a power exists in the case of any ordinary meeting, where a person otherwise entitled to be present so obstructs the proceedings that they cannot—without immediate “abatement” of the nuisance—be peaceably continued; and it would be absurd to suppose, that at least an equal power is not possessed by public functionaries in the discharge of their important duties. But to remove a turbulent or misbehaving person for the moment, merely, without the correlative necessary power of continuing his enforced absence, for the required period of peaceful progress, would be nugatory and idle. It would seem reasonably to follow that a magistrate might, instead of removing the offender, refuse any further to hear him in the case pending—at all events, until he shall have given full assurance by apology or retraction, and otherwise, that he will not repeat the objectionable conduct.

The question is, however, whether—for any such insulting or unbecoming conduct as is supposed—the offender could be prevented from entering the room, or taking part in proceedings there, before another or the same magistrate, on a day subsequent to that of the misconduct. We need not now consider, whether the offender could be lawfully so restrained by the same justices or justice on the same day; because, for such a purpose (if not for all purposes), it may be considered that the same tribunal then continued there sitting, although some other case had commenced, or some other

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cases even had intervened. That was the state of things existing, it appears, in *Ex parte Cory*—decided by Mr. Justice *Milford* in Chambers, in April, 1859. But here there was clearly a new case pending, a different party interested, and a new and distinct tribunal—even though, in fact, the same individual justice may have been sitting. The latter, therefore, had in our opinion no jurisdiction over Mr. *Cory*, in respect of his previous misconduct, whatever it may have been—and was bound, consequently, to hear him on behalf of his new client.

In deciding thus, that the mandamus applied for must issue, we would impress on the applicant, and on all others in his position practising in police offices, the importance of the duty which devolves on them in conducting their cases, to exhibit towards the presiding justices or justice not merely deference and respect, but towards them and others, that courtesy of demeanour and language, which becomes gentlemen at all times, whatever disturbing influences may interpose. The most fearless advocacy of a client's interests, there or elsewhere, is quite compatible with the exhibition in the highest degree of all that is here insisted on—while, for errors in any judicial decision, there is a remedy by appeal. If, therefore, at any time, regardless of his duty, the applicant shall stand convicted before us of misconduct, such as we have characterised in this judgment as grossly unbecoming and punishable, he may be assured that an example will be made, such as shall be likely, effectually to deter him and others from similar impropriety (a).

Rule absolute.

(a) See *Haylock v. Sparke*, 1 E. & B. 471; 22 L.J.M.C. 67; *Parker's Case*, *Ventriss* 331; *Bac. Ab. Courts (E)*; 4 *Step. Comm.* 421; 2 *Id.* 669; and *Ex parte Carroll*, 1 *Sup. Ct. R.*, C.L. 311.

Ex parte HAMILTON.

December 15.

SPECIAL case stated under the Real Property Act of 1862.

The question—which was brought somewhat irregularly (a) before the Court—was, whether a person claiming, as the applicant *Hamilton* does, to be the owner of land which was in the adverse possession of another (one *Stockdale*), was entitled to have an application made by him to have the land in question brought under the provisions of the Act entertained by the Registrar General.

Milford for the applicant. The question is in substance this—whether a person claiming, as *Hamilton* does, to be the owner of land which is in the adverse possession of another person, is entitled to have it brought under the provisions of the Real Property Act of 1862 (b). It will be contended that according to schedule A. (c) such person is not so entitled. But the 14th section is clearly in favour of the application in such case being entertained; for that clause requires every applicant to state in his application “the nature of his estate or interest, and of every estate or interest held therein by any other person, whether at law or in equity, in possession, or in futurity or expectancy, and whether the land be occupied or unoccupied—and if occupied, the name and description of the occupant, and the nature of his occupancy, and whether such occupancy be adverse or otherwise;” and this information is required

An application to have lands brought under the operation of the Real Property Act of 1862, must be entertained by the Registrar General, although it appears by the terms of the application that the lands in question are, as a matter of fact, occupied by some person who does not claim in any way to be there under the applicant.

(a) There was some discussion as to the form of the proceeding, whether it was in fact, or to be deemed and taken as, a rule or summons, under the 107th section of the Act, or a case by the Registrar General under the 108th section; but it was agreed that the question should be decided on its merits without reference to the particular form.

(b) 26 Vic., No. 9.

(c) The form of application in schedule A. says—“And I further declare that there is no person in possession or occupation of the said lands, adversely to my estate or interest therein; and that the said land is now (here state name and description of occupier, or that the land is unoccupied, &c., &c.

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in order that notice may be given to such party. But it is submitted that the applicant need not be in possession himself, in point of fact. His estate or interest only, is to be an estate or interest in "possession"—that is, not in expectancy or remainder. Seisin does not necessarily imply bodily seisin. The 13th section also clearly supports the present application. The 15th section shows that where there is a grant from the Crown, it is immaterial whether or not any body is in possession. The schedule is confessedly a mere form, which must occasionally require variations according to the facts. How can it be supposed that the applicant is ordered to insert matters when making his application, which must at once put him out of Court if the schedule was intended to be imperative so far as relates to the statement of possession? In short, if the mere form provided by the schedule is left out, the entire Act is in harmony. Which then is to prevail? The person in adverse possession can apply, under the 23rd section, to a Court of Equity for an injunction to restrain the Registrar General from proceeding. [Stephen, C.J. But is not the application after all a mere pretence? Is it not in truth an attempt to try an action of ejectment in the Registrar General's office, on less formal and less legal evidence than would be required in a Court of law, and to deprive the party of his appeal to the Privy Council? If the Act allows this, there is an end of the question. But then, how is the party in actual possession to proceed if he puts in a *caveat*?] It is submitted that no hardship can be inflicted, because in any event the applicant must prove his case, and the party in possession might proceed under the 23rd section to protect his interest.

Isaacs for the Registrar General. No one who is not in bodily occupation of the land, is within the term "proprietor," within the definition contained in the 3rd section; and nobody, except such a proprietor, can apply. If an applicant can make his application in these general terms, leaving out the statement as to persons

being in possession, the greatest injustice might be wrought. The Act does not assume to alter the legal rights of the person in adverse possession, nor does it deprive him of his right to have this matter tried by a jury. The Act provides for all other interests in the land, but not for those in adverse possession, which shows that such cases were not contemplated by the Act. [Stephen, C.J. By the 11th section, the Registrar General can only summons "persons interested," to produce their instruments of title. But a person in adverse possession is not necessarily a person having any interest whatever in the land. Frequently, he is a mere intruder without a shadow of right.] A mortgagor or mortgagee, or person being only an encumbrancer of any kind, or a tenant for life, cannot be registered; nay, they may not apply without the consent of all who are interested. Does not all this tend to show that in disputed cases, or, at all events, in cases *prima facie* disputable, it was not intended that the Registrar General should have the power to register? All the rather, because if the Registrar General shall give a title to the wrong man, the latter by the 53rd section will acquire an indefeasible title, and the proper owner is thrown on the assurance fund. It is submitted that it is a monstrous thing in such a way to try a question of disputed title against a person in possession, and thus compel him to state and maintain his title. The statute is one relating to procedure, and does not purport to alter the legal rights of parties; and the Court will not by construction effect so fundamental a change, unless the language of the statute is distinct (a).

The judgment of the Court was now delivered by

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STEPHEN, C.J. The question submitted by this special case, arising on the construction of the recent Act, passed to simplify and render less expensive the transfer of real property, has been twice argued—once before Mr. Justice Wise and myself, and afterwards

(a) See *De Winton v. The Mayor of Brecon*, 26 Beav. 544; and *Walter v. Adcock*, 31 L.J. Ex. 380.

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before the three Judges; and I confess myself to be, still, not altogether free from doubt respecting it. Upon the whole, however, I agree with my colleagues that there are enactments in this statute, in some of its clauses, which countervail the form and terms contained in section 13, and in the schedule; and that the claim of the applicant, therefore, to have the land in contest brought (as the statute calls it) under the operation of the Act, must be entertained.

I assent to this conclusion with reluctance—and, as already intimated, after much hesitation. The Act was not passed, as I conceive, to enable persons to try either litigated or doubtful questions, of *title* to real property. Although called by a more comprehensive name, this law has one sole object—that of simplifying the process, previously most cumbrous and burthensome, by which such property may be *transferred*. The Act assumes, therefore, in the prescribed form of application, that the person seeking the benefit of its provisions is indisputably the owner—already ascertained, and actually in possession. Nor can any land be brought under them, accordingly, where there is a divided or in any degree antagonistic interest, without the concurrence of all parties. There are clauses, of course, directing notice to be given to various persons, not on the land described merely, or to its occupiers, but to those who are on adjoining lands also—lest by possibility other claimants should exist, or a neighbour's boundaries be mistakenly included. And, as a necessary preliminary to transferring land, the right to do so must obviously be shown to the tribunal, which is to sanction and perfect the transfer. But the legislature, surely, could never have intended to enable an applicant—under the pretence (for it is nothing better) of desiring only an inexpensive mode of transferring his property—to proceed in effect against an adverse claimant, or at all events a person in actual adverse possession, and compel the latter thereupon to disclose, if not establish, his right to that possession.

The immediate consequence of this is, obviously, or it

undoubtedly may be, to reverse all long established rules, by casting the burthen of proof upon the possessor, instead of requiring it from him who merely asserts the right to be possessed. And I discover no set-off against that consequence, in the main, so injurious to sound policy, beyond this—that in some cases perhaps the advantage may be gained, if it be one, of enabling a claimant to establish an equitable, and possibly long dormant title, without the intervention of either a Judge or a jury, upon evidence which would not be admissible in a Court of law. It is sufficient to say, however, that—if our construction of the statute be correct—these possible consequences are not to be regarded. It may, moreover, probably, be found practicable occasionally, to avoid them. But, whatever the incidental result, it follows from this judgment that every man claiming a title to landed property, although possessed adversely by another for many years (any period short of twenty years), may bring it under this conveyancing statute, and cause an indefeasible title thereto to be recorded through the Commissioners, in his favour, against all the world.

MULFORD, J. By the 14th section of the 26th Vic., No. 9, every person applying to have his land brought within the operation of the Act, is, amongst other declarations, to state whether the land be occupied or unoccupied—and if occupied, the name and description of the occupant and the nature of his occupancy, and whether such occupancy be adverse or otherwise. The legislature must be taken to have some object in view, in requiring this to be done.

By the 18th section, notice is to be given to the persons, if any, stated in the declaration by the applicant-proprietor to be in occupation of such land. Here again the legislature requires notice to be given to the occupant, we must suppose, for some purpose; and nothing is said in either of the clauses to exclude a person in possession by an adverse title, or by means of an act of trespass. By the 21st section, any person claiming an

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interest in the land (which every person in possession must be presumed to do) may lodge a *caveat* with the Registrar General in the form mentioned in the schedule to the Act, forbidding the bringing of such land under the provisions of the Act; and every such *caveat* shall particularise the estate, interest, lien, or charge claimed by the person lodging the same, and the person lodging such *caveat*, shall, if required, deliver a full and complete abstract of his title. There is nothing in this section to exclude a person who may hold adversely from lodging a *caveat*.

By the 23rd section, the *caveat* shall be deemed to have lapsed, if the person lodging it shall not within three months have taken proceedings in some Court to establish his title, or shall have obtained an injunction from the Supreme Court, restraining the Registrar General from bringing the land within the Act.

Supposing then a person applying to have the land, on which there is some other person in occupation by an act of trespass or any other adverse title, brought within the provisions of the Act, the person so in occupation must, after lodging a *caveat*, apply to the Supreme Court by injunction to prevent the Registrar General from bringing the land within the Act; and thus, he must establish his right to an equitable interest in the land, for he already has the possessory legal right, and cannot bring an action against the claimant who is out of possession. The person seeking to bring the land within the Act, if he should recover in ejectment, would only acquire the legal interest (and it seems that he *need* do nothing), and the equitable interest would have to be decided by means of a suit instituted by the person actually in possession. The Act says that he is to establish his right. It therefore appears to contemplate the determining the equitable right as well as the legal right in the first instance, calling upon the person actually in possession to prove his title, as he would have to do if he were about to sell his land. No vendor could sell his land if a person out of possession made a claim which was not disposed of, unless he disproved it

to the satisfaction of the purchaser. So here the person in actual possession is called upon by the Act to shew he has a good title. There are two claimants to the estate, and the Act throws the burden of proving the right to the land on the person in possession, instead of the person out of possession. This certainly appears to have been the intention of the legislature; for the obtaining an injunction against the Registrar General necessarily includes an injunction against the person seeking to bring the land within the Act; and an injunction is especially applicable to the object sought for by the person in possession—viz., the prevention of an ejectment by the opponent. No doubt much mischief may arise from this construction of the Act; but I do not see how it can be otherwise construed. A stranger shewing some shadow of title has only to apply to have land brought under the Act and a person in possession may be obliged to discover his title. If he do not, the Registrar General will declare that the applicant has a good title, and so any defect in the title of a person who may have been in possession for twenty years will be discovered. He is obliged to enter a *caveat* and proceed thereon. This is not in accordance with the usual course of proceeding—and the well established principle of law is, that a person shall not be obliged to discover his title—but the Act itself is of an extraordinary nature, and the legislature appears to have so enacted.

The only difficulty arises from the form of the schedule A. annexed to the Act, being the declaration mentioned in the 14th section, made for the purpose of bringing the land within the Act, which contains the following clause—"And I further declare that there is no person in possession or occupation of the said land, adversely to my estate or interest therein."

Now I apprehend that when a schedule of forms is appended to an Act of parliament, it is not supposed to meet every state of circumstances that may arise, and that the forms may be added to or deducted from so as to meet the actual circumstances of the case for the time being under consideration. If there were no person in adverse

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occupation, that part of the form would be used by the applicant; if there were, the name and description of the adverse occupant would have to be inserted in like manner as if there were any other occupier. The 14th section directs that the nature of the occupancy should be stated—viz., whether it be adverse or not; but the form in the schedule is that he is to do no such thing, but is to state that there is no person in adverse possession.

The case is not without difficulty, chiefly arising from the consequences of the decision of the Court, not so much from the actual construction of the wording of the Act.

WISE, J. The question for our decision in this case is, whether an application to have lands brought under the operation of the Act is or is not to be rejected, when it appears by the terms of the application that some portion of the land is, as a matter of fact, occupied by some person who does not claim in any way to be there under the applicant.

By the terms of the 14th section, the application is to state whether the land be occupied or unoccupied—and if occupied, the name and description of the occupant, and the nature of his occupancy, and whether such occupancy be adverse or otherwise.

The natural construction to be put on these words seems to me to be that the mere circumstance of a person being in occupation, it may be without any pretence of title whatsoever, ought not to preclude the Registrar General from dealing with the application, and causing the title of the applicant to be examined and reported upon by the examiners, and the case to be referred to the Lands' Titles Commissioners, pursuant to the 15th and subsequent sections.

No doubt the form in schedule A. is inconsistent with this state of things; but there are two answers to this objection. The first is, that, speaking generally, a schedule of forms is to be construed as merely directory, especially when the enacting part of the statute is clear (a). The second and in this case conclusive answer, is to be

(a) See cases cited in *Paley on Convictions* 133.

found in the last paragraph of the third or interpretation section of the Act. Even if not bound to do so, I cannot doubt that the Registrar General will, in such cases, require notice to be served upon the person so in possession, and that every care will be taken in working out the statute to prevent injustice being done.

It does not at all follow that the application will be proceeded with because received under the 13th section, because the 16th section provides what is to be done, if it shall appear to the satisfaction of the commissioner, &c.; and I apprehend that it even then follows that he should necessarily succeed in obtaining his certificate of title, even although there may be a good documentary title.

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THE first count was in trover for the conversion of plaintiff's goods. The second count was for breaking and entering plaintiff's house, and remaining there, &c. and for removing plaintiff's furniture, whereby plaintiff was prevented from carrying on his business, &c. There was also a count for money had and received.

Pleas (1) to the first count, except as to certain goods in the fourth plea specified, not guilty; (2) to the first count, not possessed; (3) to the same, leave and license;

portion, removed the residue, together with other goods subsequently acquired, to another place of business. The plaintiff then assigned the whole property to L. The defendant being unable to enforce his own mortgage, personally employed an agent to do so—and the latter placed the matter in the hands of a solicitor. Under the instructions of the latter (he throughout equally representing L.) the plaintiff's house was entered, and all the goods indiscriminately, which were included in both securities, were seized and sold; the sale being certainly effected, if not announced to be, for both. It was proved that the bailiff seized all the goods at the same time, under each bill of sale; and that the proceeds, after deducting the expenses and the amount due to L., were remitted to and received by the defendant. In an action of trespass for this illegal entry upon the house, and trover for this seizure and sale, the defendant pleaded not guilty and not possessed. Held that the defendant was liable for such entry, and for the intrusion by his agent up to the day of sale. Held also (Wise, J., dissentient) that under these circumstances the defendant must be presumed to have seized, and to be responsible for those goods only which were included in the mortgage to himself; and as the jury had given damages as for the seizure and conversion by the defendant of all L.'s goods, a new trial was granted.

G. gave a bill of sale over certain goods to the defendant. The plaintiff, in ignorance of this mortgage, purchased these goods from G.—took possession of them, and having sold a

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(4) to the same, that a portion of the goods in the declaration mentioned were and are goods specified in a certain schedule hereinafter mentioned; and as to so many of the said goods in the first count mentioned as are comprised in the said schedule of goods hereinafter mentioned, that before the alleged conversion a certain indenture was made between one *Gunst* and the defendant, &c. The plea then set out the bill of sale at length (a), and after identifying the defendant as one of the parties to the bill of sale, averred that at the time of the conversion the £450, for which the bill of sale was security, was owing by *Gunst* to the defendant, together with interest; and that "the defendant did thereupon, and by reason of his being in law the owner of the said goods and entitled to the possession thereof, hold possession of the said goods in the said schedule set forth, which is the alleged conversion in the declaration mentioned and herein pleaded to." (5) To the second count, as to the breaking and entering, not guilty; (6) to the same, as to the removing plaintiff's furniture, etc., that except as to the goods in the eighth (qu. ninth) plea mentioned, not guilty; (7) to the same, as to the removing plaintiff's furniture, &c., not possessed; (8) to the same, leave and license; (9) to the same, that a portion of the furniture, &c., were and are goods specified in a certain schedule hereinafter mentioned; and as to the removing, &c., of so much of the furniture, &c., as are comprised in the goods in the schedule to the bill of sale hereinafter mentioned and sought to be incorporated in this plea, that before the removing, &c., of the goods herein pleaded to, a certain indenture, with schedule attached, was made between one *Gunst* and the defendant (being the indenture and schedule in the fourth plea set forth, and sought to be incorporated in this plea). The plea then, after identifying the defendant, stated that after the execution of the bill of sale by *Gunst*, the

(a) The material parts of it will be found in the report of this case on demurrer, 2 Sup. Ct. R., C. L. 236.

plaintiff entered into possession of the goods in the schedule set forth, with notice of the defendant's right thereto. It then averred that at the time of the removing, &c., the £450 was due and owing by *Gunst* to the defendant, with interest; and "the defendant thereupon, he being then in the said house by virtue of the said indenture, and by reason of his being in law the owner of the goods and entitled to the possession thereof, did quietly remove," &c., the goods mentioned in the schedule, which are the alleged trespasses, &c. (10) to the common count, never indebted. Issue thereon.

At the trial before *Wise*, J., it appeared that there had been a bill of sale to secure £500 to the defendant, of certain goods, medicines, and bottles containing them, and other articles, from one *Gunst*, who carried on business at Grafton as a chemist. The plaintiff, in ignorance it would seem of this mortgage, purchased these goods, took possession of them, and sold by retail a considerable portion. He then removed the residue, together with various goods subsequently acquired, to another place of business. The identical bottles, formerly belonging to *Gunst*, continued in use as the receptacles of the new, indiscriminately with the old drugs of the same kind. In this state of things (on November 26, 1861), the plaintiff by a bill of sale assigned the whole property to one *Lowenthal*, as security for the payment of two bills, at three and six months, of £30 each, dated November 26, with a proviso that if the plaintiff paid *Lowenthal* "£30 at the expiration of three months from this date, and £30 at the expiration of six months," then *Lowenthal* should re-assign the said property. The first of the two bills was duly honoured. The second was due on the 29th May.

The defendant, living in Sydney, employed an agent, Captain *Wiseman*, to enforce his mortgage, telling him that he had heard by letter that the plaintiff was making away with his property, over which he had a bill of sale, but giving him no specific instructions. In pursuance of this authority, Captain *Wiseman* placed the matter in the

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hands of Mr. *Michael*, a solicitor on the spot; under whose directions (he throughout representing equally *Lowenthal*) everything was subsequently done, that forms the subject of this litigation.

On May 20, 1862, a bailiff, under Mr. *Michael's* instructions, entered upon the plaintiff's house, and (the latter being away from home) seized the goods indiscriminately, and closed the shop.

The bailiff, *Sampson*, who actually made the seizure, was not called; but the auctioneer who employed him, being himself instructed by the solicitor, stated that he directed the seizure under that instruction. The auctioneer was, in the first instance, told to seize for Mr. *Manning*; but afterwards for him and *Lowenthal* jointly. The witness had, at this time, been furnished with both bills of sale—and he showed them to the bailiff before the seizure. Having for some reason, however, been desired at first to keep *Lowenthal's* name back, the witness said nothing to *Zimmller* respecting the second mortgage, until about the fourth day following. A written authority signed by *Michael*, and addressed to the auctioneer *Maurice*, directed him "to seize the property comprised in the accompanying bill of sale, *Gunst* to *Manning*, and now in the possession of Messrs. *Zimmller* and *Woods*." The evidence fully proved that the bailiff did—that is, so far as in him lay—seize all the goods at the same time under each bill of sale. It was contended for the plaintiff that the seizure, under *Lowenthal's* bill of sale, was altogether a pretence; and there were many circumstances which led to this suspicion, and especially because the bill of sale to *Lowenthal* was only at that time enforceable from the word "months" having been used in it instead of calendar months. The plaintiff, for these reasons, supposed that the bailiff seized on account of the defendant's claim alone. But the seizure was of all the goods indiscriminately, which were included in both securities; and the auctioneer declared positively, that he shortly afterwards told *Zimmller* it was made for both claimants.

On the 3rd June the bailiff sold all the goods seized;

the net proceeds of which amounted to £64 9s. A 1864.
 cheque for £22 18s. was remitted by *Michael* to the ZIMMLER
 defendant with the following account:— v.
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“ Net proceeds as per auctioneer’s account sale, of }	£64 9 0
which copy annexed	
Paid possession money	£7 7 0
Paid Mr. <i>Lowenthal</i> cash	£28 19 0
Gratuity to bailiff	£1 1 0
	—————
	£30 0 0
Cheque to Mr. <i>Manning</i>	£22 18 0
Mr. <i>Michael’s</i> charges in both cases	£4 4 0
	—————
	£64 9 0

Grafton, June 4, 1862.

JAMES L. MICHAEL.”

The learned Judge directed the jury that, in respect of any goods not in the bill of sale by *Gunst* to *Manning*, the plaintiff was entitled to their value, even although they might have belonged to *Lowenthal*—and that neither the entry into the plaintiff’s house, nor the seizure of the goods on behalf of *Lowenthal*, could afford any defence in the action. The jury found for the plaintiff, damages £150; and no damages were given in respect of any goods contained in the mortgage from *Gunst* to *Manning*.

Sir *W. Manning*, Q. C., for the defendant, obtained a rule *nisi* for a new trial, on the ground of misdirection.

Darvall, Q. C., and *Butler* showed cause. The rule *nisi* is not in accordance with the judgment of the Court. [Stephen, C. J. It is inconvenient to discuss that question now. Application to amend the rule should be made immediately after the service of the rule.] It is submitted that the defendant is wholly responsible for the grievances complained of. The wrongful seizure of the goods, which the defendant was not entitled to at all, instantly gave the plaintiff a right to recover from him their value—and the defendant cannot set up in answer the title of *Lowenthal*. In the words of *Crompton*, J., in *Waters v. The Monarch Life and Fire Insurance Company* (a), “the plaintiff is

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entitled to recover the whole value of the goods in trover, subject to a liability to pay over to the party who has the absolute property such a portion of the money received as belongs to him." On the same principle in trespass for taking away goods sold by the defendant to the plaintiff, and not paid for according to the contract, the plaintiff is entitled to the full value. The jury cannot take into consideration the debt due in respect of them from the plaintiff to the defendant, because the re-taking the latter would be no answer to an action by him for their price; *Gillard v. Brittan* (a). *Mayne on Damages* (b) was referred to. The relying on *Lowenthal's* bill of sale was, however, a subterfuge and an afterthought. Each has concurred in the sale of the whole, when each was only entitled to sell a part. If the sale was by both, it was clearly by each; and, therefore, the defendant is responsible for selling what he had no right to seize or sell. *Sowell v. Champion* (c) is an authority that where goods were taken under process upon a regular judgment, but in a place to which the process did not run, the plaintiff may recover the whole value of the goods, and not merely the amount of damage which he has sustained by their being taken in a wrong place.

If there was no previous authority there was a ratification with knowledge of what had been done, or with indifference by the defendant as to what was done—he being willing to take upon himself, without inquiry, all the risk of excess or irregularity; *Freeman v. Rosher* (d). The plaintiff relies on the defendant's receipt of the money, after getting a written account from *Michael*—in which four guineas are charged for *Michael's* services, and seven days' possession money to the bailiff. Even if the defendant only gave authority to *Michael* (or rather to Captain *Wiseman*, who afterwards puts the case into *Michael's* hands), in general terms, to do the best for him that he could, or the like, that would make the defendant responsible for the sale and seizure. He

(a) 8 M. & W. 575.
(c) 6 A. & E. 411.

(b) p. 225
(d) 13 Q. B. 789.

gave up the bill of sale at the time to *Michael*, with instructions to try and obtain payment. What did this mean, if not that *Michael* was to seize and sell if, in his opinion, it was necessary? Neither ought the damages to be reduced by reason of the sale having been by *Lowenthal*, who had a right to seize, though then the defendant had no such right. For what can this be, but to set up in effect the *jus tertii*, and get the benefit of that inadmissible defence in another mode? The only question is, what was the value of the goods when seized? If the defendant and *Lowenthal* by their agent seized or sold, still they did not do so jointly. It was a separate trespass by each, and moreover there is here no justification pleaded. It is altogether immaterial on these pleadings whether the goods seized were or were not the goods of *Lowenthal*. The defendant has not disputed the property in these goods at the time of the conversion; and the conversion being proved the plaintiff is entitled—in the words of *Parke*, B., in *Vernon v. Shipton* (a),—"to the value of the goods at that time." *Finch v. Blount* (b), and *Jones v. Davies* (c) are authorities that the justification now sought to be relied on, must be specially pleaded.

Sir *W. Manning*, Q. C., and *Stephen* (*Sheppard* with them) contra. If *Michael* was authorised to do anything for the defendant, it was only to seize such property as was *Gunst's*. The only written instruction was to seize for the defendant the goods "comprised in the accompanying bill of sale." But the actual seizure was, throughout, under both bills of sale. It is unquestionable that *Lowenthal* had a legal right to enter the house and seize all the goods not *Gunst's*. In *Baillie v. Kell* (d) it is laid down that where a servant is discharged on good ground, and a reason is assigned at the time, another reason may be afterwards proved. The same principle is recognised in *Grenville v. The College of Physicians* (e)—in which *Holt*, C. J., said, "suppose one has a legal

(a) 2 M. & W. 12.

(c) 6 Exch. 663.

(e) 12 Mod. 386.

(b) 7 C. & P. 478.

(d) 4 B. N. C. 638.

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and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has, is his justification." "If one distrain for an unjustifiable cause, yet, when he comes to avow, he need not insist on the cause for which he has distrained, but may justify for any lawful cause, as for rent arrear, though he distrained for some other cause; and the cause for which the distress in truth was, is not traversable, but *riens arriere* is the proper plea." If *Michael* legally seized either in virtue of the defendant or *Lowenthal's* right, the defendant cannot be made responsible. You may discharge a servant for one cause, and justify for another. So the party acting under two authorities, one good and another bad, is justified. But if *Michael* could justify the seizure, how can the defendant be responsible? He referred to the judgment of *Martin*, B., in *Hooper v. Lane* (a), and to *Ridgway v. Hungerford Bridge Company* (b), and *Lewis v. Read* (c). [Stephen, C. J. Should not the defendant have pleaded such justification?] There is no evidence of ratification sufficient to justify the finding a verdict against the defendant on this point; for what knowledge had the defendant that his agent had seized or sold the plaintiff's own goods, or goods that were his as against a wrong doer. [Stephen, C. J., referred to *McLaughlin v. Prior* (d), and *Gregory v. Piper* (e):]

The Judge was wrong in excluding, on the question of damages, the entry for *Lowenthal*, and also the sale for him. How was there here a "conversion" by the defendant? *Michael's* act was one, and undivided for two persons. If legal as to part in *A.*'s right and as to the residue in *B.*'s right, is it possible that *A.* or *B.* can, nevertheless, be sued with respect to that part over which he had no right? A case may be put in which the seizure by one, as agent for four others, may by the combination be legal, and yet the owner might, by

(a) 6 H. of L. 443; 27 L. J. Q. B. 89. (b) 3 A. & E. 171.
 (c) 13 M. & W. 834. (d) 4 M. & G. 48.
 (e) 9 B. & C. 591.

suing each principal in succession (neither having a right by himself, except as to a fourth part), recover in trover twice the value of the goods on the law as contended for. Suppose, for instance, *A.* buys £1,000 worth of stock from *B.*, and gives him a bill of sale over it for £500; *A.* then buys another £500 worth from *C.*, and gives *C.* a bill of sale for £500 over the whole stock; *A.* afterwards obtains more stock from *D.*, and gives *D.* a mortgage over the whole for £500; and subsequently *A.* becoming in like manner indebted to *E.*, gives him a mortgage over the whole for another £500; and again *A.* obtaining more stock from *F.*, gives him a like security for another £500; in such a case, if *B.*, *C.*, *D.*, *E.*, and *F.* authorised an attorney to realise under their several securities, and the attorney seized and sold all the stock, *A.* would be entitled, according to the law as contended for, to recover £500 damages from *E.*, £1,000 damages from *D.*, £1,500 from *C.*, and £2,000 from *B.*—in all, £5,000 damages for such seizure and sale, although the whole value of the goods is not worth that amount. The damage can only be to the extent of the plaintiff's actual interest, which was, in this case, worth nothing. Thus, when the plaintiff had assigned his goods to the defendant to secure a debt, subject to a proviso that they should remain in the plaintiff's possession till default of payment, or till a particular notice was given by the defendant, the defendant seized the goods before either of these conditions was complied with. It was held that the plaintiff might sue him, but that the value of the goods, as between the parties, was not the proper measure of damages. The plaintiff could only recover an amount proportioned to his interest in them at the time of the taking; *Brierly v. Kendall* (a). In *Sowell v. Champion* (b) the goods sold under void process were the plaintiff's goods; here, the property sold was mortgaged. [Wise, J. Surely, because goods are mortgaged, they cannot be seized by all the world with impunity?] In that case also the verdict was not for the value of the goods, but for the amount levied.

(a) 17 Q. B. 93; 21 L. J. Q. B. 161. (b) 6 A. & E. 407.

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But here there was no authority from the defendant to *Michael* to seize more than the defendant's own goods. It might be otherwise, if *Michael* had been a servant acting in the course of his master's service, as in *Huzsey v. Field* (a), and for his benefit. [Stephen, C. J. *Michael* paid off *Lowenthal* in full, and then handed the balance of the sale to the defendant.] At that time the defendant did not know all the circumstances, and cannot be held to have ratified what was done. He supposed only that he was receiving the proceeds of his own goods. Even assuming that there was an employment of *Michael* by the defendant to seize *Gunst's* goods, there was no actual seizure except by the defendant and *Lowenthal* in conjunction, or rather by the latter alone, but for the benefit of himself and the defendant. *Lowenthal* stepped in to aid the defendant by enabling him safely to seize the goods.

In *Blessley v. Sloman* (b), the defendant (the sheriff's officer) arrested the plaintiff at the suit of both *A.* and *B.* The plaintiff gave a bail bond in the action at the suit of *A.*, and also signed a paper, purporting to be a bail bond in the other action, and the defendant received from him the fees as upon a bail bond. It did not appear which was executed first; but the plaintiff was immediately afterwards discharged. It was held that the defendant was not liable, although it appeared that an hour before the plaintiff's discharge, *B.* had informed the defendant that his debt was satisfied, because the plaintiff was not shown to have been detained longer than was justifiable under the lawful writ. So *Briggs v. Greinfeild* (c) is an authority that when in an action of tort against several, some let judgment go by default and others plead; if upon the trial, the plea of those who appear not only operates as a defence to themselves, but shows that the plaintiff had no cause of action against any of the defendants, as that the goods taken were a gift from the plaintiff, or a lawful distress for rent, or that the plaintiff had released one of the joint trespassers,

(a) 2 C. M. & R. 439.

(b) 3 M. & W. 40.
(c) Stra. 610; 2 Ld. Raym. 1372.

such defence enures for the benefit of all. [*Wise*, J. There, the two defendants were charged with a joint wrongful taking; but on the record it appeared that there could not be a joint wrongful taking, because on the record one defendant was found not guilty because the plaintiff had given him leave and license; and it was held that the plaintiff could not maintain his action against the other, and judgment was arrested. The same principle applies in cases of conspiracy.] If the two principals had been jointly sued, *Lowenthal* must have obtained a verdict, and then no judgment could have been given against the now defendant; can the plaintiff by bringing separate actions succeed? The act being one by *Michael* on behalf of two, they can both be jointly sued. And how can the plaintiff say that he has been deprived of these goods by this defendant, when the evidence is that he has been deprived of them by *Lowenthal* equally, who was justified in what he did? Or how can he maintain that the goods were his, when at the moment of the sale they were in the possession, and were the property too, of *Lowenthal*? And the very act, on account of which he complains against the defendant, was that by which he (*Lowenthal*) became possessed of the goods as his own. If there was a conversion by the defendant, entitling the plaintiff to the full value of the goods, the property would be changed, and vest in him by the judgment from the date of the conversion; *Buckland v. Johnson* (a). But the goods by the very act of seizure became *Lowenthal's*. [*Stephen*, C. J. As the fact of the seizure for *Lowenthal* and his right was received in evidence, and so was before the jury, must not effect be given to these facts?] The value is not always the measure of damage. [*Wise*, J. In *Alsager v. Close* (b), the plaintiff was held to be entitled to recover the full amount of the bill for £1,600, although the defendant had only £800 remaining due on it.] The rule laid down in *Chinery v. Viall* (c) is, that the plaintiff is entitled to recover no

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(a) 15 C. B. 145; 23 L. J. C. P. 104. (b) 10 M. & W. 576.
(c) 5 H. & N. 286; 29 L. J. Ex. 183.

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more than the real damage he has sustained; the principle being that a man cannot, by merely changing the form of action, vary the amount to which he is really in law entitled according to the true facts of the case and the real nature of the transaction.

December 17. Judgment was now given in this case to the following effect:—

STEPHEN, C. J. This is an action of trespass, for entering the plaintiff's shop and dwelling, and there seizing and eventually selling sundry goods, with a count in trover as to the latter; and the pleas were not guilty, and not possessed—on which the jury returned a verdict against the defendant, assessing damages on both counts generally. It is a case of no small complication, and involving questions of law on which the Judges do not concur in opinion. It becomes necessary for each of us, therefore, to express his own; the result being, unless the parties will agree to terms of compromise, a direction that the damages be newly assessed, or the granting of a new trial.

The following are the leading facts. The defendant held a mortgage over sundry goods, chiefly drugs and chemicals, from a person named *Gunst*, who carried on business at a country town as a druggist. The plaintiff, in ignorance it would seem of this mortgage, purchased the goods—took possession of them, and sold by retail a considerable portion. He then removed the residue, together with various goods subsequently acquired (mostly of the same, but some of a different character), to another place of business. The identical bottles, formerly belonging to *Gunst*, continued in use as the receptacles of the new, indiscriminately with the old, drugs of the same kind. In this state of things, the plaintiff assigned the whole property to one *Lowenthal*, as security for a debt not then payable, but which it appears was so at the time of the seizure complained of.

The defendant, living in Sydney, and unable therefore to enforce his own mortgage personally, employed an agent to do so—giving him no specific instructions,

but leaving the mode to the latter's discretion. In pursuance of this, the agent placed the matter in the hands of a solicitor on the spot; under whose directions (he throughout representing equally *Lowenthal*) everything was subsequently done, that forms the subject of this litigation.

Having regard to the nature of the case, to the conversation which took place between the defendant and his agent, after the seizure, and to the fact that the former received the balance of proceeds of the sale (without full information, it is true, of all which had occurred, but with the means of obtaining it accessible before acceptance, had he chosen to inquire), I agree with my colleagues that the defendant made himself responsible for that seizure, so far as it was made on his behalf, and for the entry to effect it, as completely as he would have been if acting personally. But the question remains, how far and for what, if so acting—bearing in mind the participation in these acts by *Lowenthal*—he would have been or is responsible.

Now the facts concerning the seizure, as I understand the evidence, are as follows:—The bailiff who actually made the seizure was not called; but the auctioneer who employed him, being himself instructed by the solicitor, stated that he directed the seizure under that instruction. The auctioneer was, in the first instance, told to seize for Mr. *Manning*; but afterwards for him and *Lowenthal* jointly. The witness had, at this time, been furnished with both bills of sale—and he showed them to the bailiff before the seizure. Having for some reason, however, been desired at first to keep *Lowenthal's* name back, the witness said nothing to *Zimmier* respecting the second mortgage, until about the fourth day following. The plaintiff may have supposed, therefore, that the bailiff seized on account of the defendant's claim alone. But the seizure was of all the goods, indiscriminately, which were included in both securities; and the auctioneer declared positively, that he shortly afterwards told *Zimmier* it was made for both claimants. The sale was certainly effected, if not announced to be, for both.

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Lowenthal's mortgage was obviously, indeed, meant to be made use of in support of the seizure; for, to adopt the auctioneer's expression, that security covered everything. It was necessary, therefore, as the attorney and auctioneer alike must have known, to render the seizure secure, by avoiding questions as to what articles were included in the one, and what in the other instrument.

Here, then, was an entry into the plaintiff's residence, by one and the same individual, on behalf of two persons having distinct and separate interests. Of these persons, one (as was held by us on the demurrer to his plea, justifying such entry) was a trespasser as to that act; but the other may be taken to have been justified—since the latter's claim was under the plaintiff himself, who had assigned to *Lowenthal* all the goods that were seized. Whether so or not, however, the defendant I have no doubt is answerable in damages for that entry, and consequently for the continued intrusion by his agent up to the day of sale. The defendant adopted the act of seizure, certainly, as to some of the goods in the house; and he must be taken to have adopted, therefore, the entry for the purpose of that seizure. But, as an entry into the plaintiff's residence by the defendant himself would have been illegal, even in order to obtain his own (formerly *Gunst's*) goods, the entry by his agent was equally so.

As to the goods, however, the question is, what portion was seized by the defendant;—his own, merely, or those also which were assigned to *Lowenthal*, and on which the defendant had no claim. I am of opinion that he can be held to have seized, and to be responsible for, those goods only which were included in the mortgage to himself.

As to these, it is admitted that the jury gave no damages; although in strictness, as the defendant had no plea of justification on the record, the verdict might have included their value also. But the jury have found damages, confessedly, as for the seizure and conversion by this defendant of all *Lowenthal's* goods, and for all losses to the plaintiff resulting from their sale. Con-

sistently with the opinion just delivered by me, the verdict so far is wrong; and, as we have constitutionally no means of estimating and severing the damages, a new trial or a compromise between the parties is inevitable.

It was in substance urged for the plaintiff, that the seizure was one entire thing; and consequently that, although the defendant did not personally direct it, his constructive ratification of the agent's acts necessarily embraced the taking of *Lowenthal's* goods, as much as the conversion of his own. If so, or if the seizure had at first been for *Manning* alone, and *Lowenthal's* name been merely introduced afterwards, the verdict might doubtless be sustained. For, clearly, as against *Manning*, the goods acquired since *Gunst's* time, and mortgaged to *Lowenthal*, were the property of the plaintiff; and the defendant could not set up another's right, in substitution or in aid of his own. But it is material to bear in mind, that the defendant here personally directed no seizure. He simply authorised, in effect, the seizure of his own goods—not those of any other claimant. His agent, however, happening to represent a second, takes possession simultaneously of the goods of both. The defendant, so far as we can collect, knew nothing of this. He knew only that there had been a seizure and a sale; some of the goods being his own (the proceeds of which he receives, and the residue belonging to a third party, with whom and whose acts or rights he had no concern. Admitting, however, that the defendant's receipt, coupled with his previous instruction, amounted as fully to a recognition of the agent's operations as if the defendant had been accurately apprised of them, I conceive that he thereby assented to and ratified such, only, as were done (or which purported, or were meant to be done) on his own behalf, and not those which were done for a stranger.

The agent seized both sets of goods, it is true, and by one and the same act, not being able wholly to distinguish between them. But, in so doing, the intention clearly was to take and retain for each owner that portion to which he exclusively was entitled; that is to say, for

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the defendant the goods which had belonged to *Gunst*, and for *Lowenthal* those which belonged to *Lowenthal*, and this being so, I hold that the defendant ratified, and is responsible for, no more.

To determine otherwise, would not merely make the defendant a trespasser, by relation, in respect of an act which (as concerning the goods mortgaged to *Lowenthal*) was not committed for his benefit, or in any way on his behalf—but would involve the further consequence, that in a case of this kind there never could be a legal seizure by either mortgagee. For, many of the goods being indistinguishable as to ownership, neither owner could separately seize without committing a trespass as to the goods of the other. But, if both parties in concert seized, as here, by an agent, the same result would still follow; since, by the hypothesis, he would as *Smith's* agent have no right against the mortgagor to take the goods of *Jones*—while, as agent for *Jones*, he could have no right to meddle with the goods of *Smith*. Thus the mortgagor might maintain actions, separately, against each creditor—although the agent representing both would have seized simply their own property, and no more.

The pleadings in this case, according to my view of it, are strictly in accordance with the defence; which is, as to the goods of *Lowenthal*, not a justification for taking them, but a denial that the defendant (personally or by agent) ever took them at all. On the trover count, therefore, the verdict should on the plea of not guilty be entered for the defendant. Inasmuch, however, as that plea extends equally to the entry, and the staying in the house until the sale, both the issues on the first count will stand for the plaintiff as at present. But, unless some arrangement can in the meantime be made, there will (Mr. Justice *Milford* concurring with me) be a new trial, or a new inquiry as to the damages—which must be confined to the two points just mentioned, and matters incidental thereto. The costs of the new trial or assessment, with those of the first trial (as to the issues on which he succeeds), to be costs in the cause to the

plaintiff; but each party to bear his own costs, as to this motion.

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MILFORD, J. It is needless for me to add anything to the judgment of the Chief Justice, as we have agreed upon the substance of it in consultation. I may, however, add a few words, pointing how the case particularly strikes me.

The defendant could not have entered on the plaintiff's house without committing a trespass. *Sampson*, the bailiff, entered as his agent, which act was ratified by the defendant, and the defendant therefore committed a trespass. *Sampson* also entered for *Lowenthal*, who had a right to enter; but that does not exclude the entry for the defendant, who had no right to do so.

Sampson then being in possession rightfully, i.e. by virtue of the authority from *Lowenthal*, he takes advantage of his situation to act as well for the defendant as for *Lowenthal*, and I do not see any objection to his doing so. The trespass committed by the defendant may fairly be held to be complete by the entry, and he is answerable for it under the first count of the declaration. *Sampson* then, by virtue of the authority given to him by *Lowenthal*, being lawfully in possession, acts as well for the defendant as for *Lowenthal* by seizing the goods. The entry on the house is one cause of action; the seizing and selling of the goods for the defendant, if wrongful, is another cause of action. The question then is, was such seizure wrongful? If the defendant had been lawfully in the house, he might have seized and sold the goods pledged to him, and *Sampson* had the same power, acting as his agent.

The evidence is, that *Sampson* sold for both the defendant and *Lowenthal* at the same time—not for one before the other. He made no declaration for whom he sold, and he had authority from both. He cannot be considered as having sold all for the defendant and all for *Lowenthal*, for that would be absurd. He must have sold part for one and part for the other. Then, in the absence of any evidence, he must be held to have

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sold for the defendant what the defendant had a right to sell, and for *Lowenthal* what *Lowenthal* had a right to sell. So the defendant did no wrong as to the seizure and sale.

The damages are given for the trespass of which *Manning* is guilty, and for the seizure and sale of the goods of which he is not guilty. The Court cannot reduce the damages, for they have no finding of the jury by which to do so. I therefore think there must be a new trial.

WISE, J. I regret that, notwithstanding repeated conferences upon this very peculiar case, I and my learned brothers have come to different conclusions. I will proceed, therefore, to state the grounds upon which I am of opinion that the defendant is liable for the seizure and conversion of the plaintiff's goods, as well as for the entry into his house.

The facts are substantially set out in the judgment of his Honor the Chief Justice; except that I do not think it sufficiently appears from that statement, that at the trial before me the evidence fully proved that the bailiff did—that is, so far as in him lay—seize all the goods at the same time under each bill of sale. This, indeed, was not disputed at the trial before me; the only doubt was whether the seizure under *Lowenthal's* bill of sale was not altogether a sham. There were many circumstances that led to this suspicion, and especially because the bill of sale to *Lowenthal* was only enforceable from the word "months" having been used in it instead of calendar months. So that in law there was a right to enter under the bill of sale, although the promissory note for three months (*i.e.* calendar months), by which the only remaining instalment (about £25) was secured, was not due until after the seizure, and *Lowenthal* did not appear to have done anything more than ratify the act of his attorney. The jury, however, declined to answer a question put to them upon this point.

I directed the jury that the defendant was liable for the alleged act of his agent if he ratified it, just in the

same manner as if he had directed it to be done; and using the language of the Court of Queen's Bench in *Freeman v. Rosher* (a), that ratification might be by adoption with knowledge, or by a person taking upon himself, without inquiry, the risk of any irregularity which the agent might have committed, and so adopting all his acts—the latter alternative being equivalent to ratifying with knowledge, because the intention to adopt the act at all events is the same as adopting with knowledge. This direction the Court held to be right, and also that the evidence warranted the verdict. The difference between myself and my learned brothers, therefore, is the application of this and other legal principles to the facts of the case. Now, the ratification having taken place, the act must be taken to have been done by the defendant's direction—"Omnis ratihabitio retrotrahitur et mandato priori aequiparatur;" and under the principle which determines all questions of agency—"qui facit per alium facit per se." The tort for all purposes of liability must be taken to have been done by the defendant in person. In accordance with these principles, my learned brothers agree with me, that the defendant is liable for the entry into the plaintiff's house—that is, that the bailiff was the distinct and separate agent of the defendant and of *Lowenthal* in his entry. In other words, the legal position of the defendant is the same as if he had in his own person made the entry, and yet the agent, who alone was personally present, if sued, could have justified under *Lowenthal*. For the agent, if sued, could have justified under *Lowenthal*, according to the doctrine that a man acting under a legal authority may justify under that authority, even though he may have professed to act under an authority which he did not possess. The act of entry would thus, *quoad* the agent, be indivisible, but, *quoad* the principals, be a separate and distinct act.

With all respect to the opinions of my learned brothers, I am unable to see any reason why these principles should not be applied to the seizure and conversion

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of the goods as well as the entry, and many reasons why they should be so applied.

The effect of the agent's—that is of the defendant's—act, was to render it useless for the plaintiff to make any exertions to pay off the small sum due to *Lowenthal*; and indeed Mr. *Michael's* answer, when the plaintiff proposed to pay this sum, clearly showed that the sale would go on just the same. This was in accordance with that person's previous conduct—who, I may remark, although present at the trial, was not called; for whatever secret instructions he might have given to the bailiff, he told the plaintiff that the seizure was under the defendant's bill of sale, and said nothing about *Lowenthal's* bill of sale.

Carrying out the same line of conduct, he stated, according to the evidence of Mr. *Fisher*, apparently a disinterested witness, that the sale was on account of the defendant, while the auctioneer stated that it was for both. The greater portion of the goods were sold in two lots—the fixtures fetching about £20, and the drugs about £40.

Under these circumstances the plaintiff was, in my opinion, directly injured by the act of the defendant's agent, directed (that is, ratified) by him; and it was as if the defendant had been present, and said, "until the amount of my bill of sale (£500) is paid, those goods, although not included in my bill of sale, shall not be touched by you (the plaintiff); and as I have entered to take all that were there to be taken, so I shall keep possession and sell."

Cases of such a singular nature as the present can hardly ever have occurred: but one nearly approaching to it in principle might, with advantage, be put to show the soundness of my opinion. Suppose a person arrested by a sheriff's officer under two writs of *ca. re.*, one issued *bona fide* by a creditor for a small sum, the other for a large sum by a person maliciously and without reasonable and probable cause. His liberty would have been interfered with, even although the second writ had never been issued—but I have no doubt he would have an

action against the person who issued the second writ for his wrongful act; and it would be no answer for him to say "you would have been arrested just the same if my writ had not been issued." The act would have been wrongful; and just as the inability to meet both writs might prevent any effort to meet the just writ, so in this case it was useless for the plaintiff to pay off *Lowenthal's* small debt of £26, if the seizure was to continue in force to satisfy the defendant's claim of £500.

To allow the defendant to be sheltered by the accidental circumstance of another person employing the same agent, seems to me to be at variance with the established principle that a wrong doer shall not be allowed to set up the right of a third person.

It may be convenient here to refer to two recent cases, showing how strictly this doctrine has been carried out. In *Jefferies v. Great Western Railway Company* (a) the plaintiff claimed under a bill of sale certain waggons, which he alleged he had bought for good consideration from a person, who however remained in possession of them, and whilst so in possession affected to assign them for a valuable consideration to the defendants. The vendor then became bankrupt, still having the waggons in his possession. The plaintiff afterwards obtained possession of them, and the defendants took them from him. The Court of Queen's Bench held that the defendants being wrong doers could not set up either by way of defence or mitigation of damages, that the waggons really belonged to the assignees under the bankruptcy. So in *Turner v. Hardcastle* (b), where the assignees of a bankrupt brought trover for goods which had been purchased by the bankrupt under an agreement by which the purchase money was to be paid by instalments, and an assignment of the property was to be executed by the vendor when the whole purchase money was paid, with power for him to re-enter in case of default in payment of the instalment, the Court of Common Pleas held that the plaintiffs were entitled to recover the full

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(a) 5 E. & B. 803; 25 L.J.Q.B. 107.
(b) 11 C.B.N.S. 683; 31 L.J.C.P. 193.

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value of the goods against a mere wrong doer, notwithstanding default had been made in payment of some of the instalments, and the vendor had to that extent an interest in the goods.

These cases decide, and I think for good reasons, that a man who has no right or interest in goods, cannot protect himself from the consequences of his wrongful act by saying that if he had not taken the goods, the possessor of them would have been compelled to give them up to some other person.

That the view I take of the present case is the correct one, will, I believe, be also shown by considering what appears to me to be the necessary result of holding that the defendant is not liable. Supposing none, or only a very small portion of the goods had been included in his bill of sale, would not the same reasons now adduced to protect him from the consequences of the act of his agent be equally applicable? It would be said, "his agent was to seize only what was in the bill of sale, and although he did affect to seize these goods, and the proceeds of the sale have reached his employer, yet the seizure was for his other employer." But what could be more likely to give rise to oppression without the party injured having any redress? An attorney or bailiff wishing to obtain possession of goods for one principal would only have to put in force at the same time a bill of sale for a small sum, on behalf of another, sell, and pay over the proceeds, part to the owner of the rightful bill of sale, and the residue to the person who had no right. By the force of this judgment of the Court, if the party receiving the money were sued for theseizure, his answer would seem to be—"the seizure was under the other bill of sale; I only authorised the agent to put in force the bill of sale—that is, to seize what was included in the bill of sale. He did seize, it is true, but that was under the other bill of sale; and although I received the proceeds of the goods, that was money which the person who rightfully seized held as trustee for the owner of the goods, and my consenting to receive

it, as a present from him, does not make me liable to the owner of the goods in trover."

This would seem to be the legal result of the present judgment, and, even if he might be held liable for money had and received, which I do not see that he could, it would be a very inadequate redress to the owner of the goods which had thus been sold, as a matter of fact, under both bills of sale, although, as a matter of law, under one only.

For these reasons, in which I have been unable, doubtless from their insufficiency, to obtain the concurrence of my learned brothers, I am of opinion with them that the defendant is liable for the entry into the plaintiff's house, but, differing from them, that he is also liable for the seizure of the goods; the entry and seizure being made for him by his agent, and found by the jury to have been ratified in the way above mentioned.

It is unnecessary for me to consider whether the damages were too high, as there must be a new trial.

Judgment accordingly.

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THE QUEEN *against* TUPHOLME (a).

December 9.

THE petition of right stated, that after the passing of the 24 Vic., No. 9, and while the said Act was in operation, to wit, on the 15th April, 1863, one *J. Hamilton Scott*, then being the owner or person in charge of

In a petition of right it was stated that the suppliant was an informer and prosecutor

under the Scab Act against S., for a breach of the 14th section, and that S. was convicted and fined by two justices, and that the justices directed the whole of the fine to be paid to the clerk of Petty Sessions—he being the clerk of the division in which the justices usually acted; and also ordered, in pursuance of the 16 Vic., No. 1, s. 15, such clerk to pay a moiety of the fine so to be received to the suppliant, as being entitled to the same under the statute; but that the clerk had refused to do so. The suppliant then stated, that afterwards the Government remitted the whole fine on certain equitable grounds; but that in the meantime the clerk embezzled the money, and it had never been paid over to any body, and prayed that he might be enabled to recover from the Crown itself the amount of the moiety of the fine, as money received by the Crown to the use of the suppliant. *Held*, on demurrer, that the plaintiff was entitled to a moiety of the fine, under the 16 Vic., No. 1, s. 15; but that the Crown was not responsible. *Quare*, whether the order of the justices was correct.

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sheep, brought a large number of sheep, to wit, 10,000 sheep, across the boundary line between the colony of Queensland and this colony without having first procured from an inspector for examining sheep of the districts of this colony adjoining the boundary line a certificate stating that the sheep were not infected with the scab. The suppliant thereupon and afterwards, to wit, on the 7th September, in the year before mentioned, gave information to *John Cochrane*, Esq., one of Her Majesty's Justices, &c., of the breach of the statute committed by the said *J. Hamilton Scott*. In consequence of the said information a summons was issued by the said justice against the said *J. Hamilton Scott*, commanding him to be and appear at Urana, in the said colony, on the 8th September, in the year last mentioned before such justices of the peace as might then be there to answer the said information, and to be further dealt with according to law; and thereafter, to wit, on the 10th September, in the year aforesaid, on the hearing of the said summons, the suppliant gave evidence against the said *J. Hamilton Scott*--and the said *J. Hamilton Scott* was then convicted, according to due form of law, of the breach of the statute as aforesaid, and was ordered and adjudged by the said justices to pay a fine of three-pence per head on each of the sheep aforesaid to one *James Shelley*, then being and acting as clerk of the division in which the said justices acted, and who also attended and acted as such clerk of the said division and of Petty Sessions for the said division on the day and year last aforesaid, by the special order of *Charles Cowper*, Esq., her Majesty's then Chief Colonial Secretary for the said colony. That *J. Hamilton Scott*, in pursuance of the said order, paid the whole amount of the said fine, to wit, £137 10s. to the said *James Shelley*, as such clerk of the said division. That in consequence of the premises, and by virtue of the statute passed in the sixteenth year of the reign of her Majesty, the suppliant became entitled to one moiety of the amount of the said fine, as the informer or person prosecuting or suing for the same, and in pursuance of the said last

mentioned statute; and after ordering the said *J. Hamilton Scott* to pay the amount of the fine, the said justices also ordered the said *James Shelley* to pay a moiety of the amount of the said fine so to be received, and so received as aforesaid by him from the said *J. Hamilton Scott*, to the suppliant, as the person being entitled to the same under the said statute. That notwithstanding the order of the justices and repeated applications to the said *James Shelley* by the suppliant for the moiety of the amount of the fine, the said *James Shelley*, up to the date of this petition, has persistently refused to pay unto the suppliant any portion of the moiety of the fine, and the suppliant has received no portion of the fine. That the said justices, on behalf of the suppliant and also the suppliant by his attorney, &c., had applied to her Majesty's honorable the Chief Secretary, and also to the honorable Secretary for Lands, for the suppliant's moiety of the fine, and the only answers to such applications, which the suppliant had received, had been, first, from the said honorable Secretary for Lands, that her Majesty had been graciously pleased to remit the amount of the said fine so inflicted on the said *J. Hamilton Scott* as aforesaid, which it is humbly submitted by the suppliant it is not within Her Majesty's prerogative to do as to the said moiety of the said fine, which the suppliant humbly claims; and, secondly, from her Majesty's said honorable Chief Secretary for this colony, that the amount of the said moiety formed part of sums embezzled by the said *James Shelley*, and that it was considered that Her Majesty's Government was not liable for it.

The petition then concluded with the prayer that her Majesty might be graciously pleased to grant Her fiat, that right might be done to the suppliant in respect of the premises, in her Majesty's Supreme Court of this colony, and also that your suppliant might be enabled to recover the amount of the said moiety of the said fine in the said Court, if it should so seem lawful to the said Court, as money payable by your Majesty's Government to the suppliant, for money received by your Majesty's

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said Government for the use of the suppliant—and also such damages and costs as the said Court might award to your petitioner in respect of the premises.

To this petition the Attorney General on behalf of the Crown demurred, and the suppliant joined in demurrer.

The *Solicitor General* in support of the demurrer. Under the 16 Vic., No. 1, s. 15, the informer was entitled to one half of the fine, and the justices were bound to direct that it should be paid to the informer. The latter has his remedy by action of debt against the party convicted, for the moiety of the fine, when it is "recovered"—that is, when the sentence has been pronounced. The whole of the penalty was paid wrongly in pursuance of the 31st section of Sir *John Jervis'* Act (a), by the direction of the justices to the clerk of Petty Sessions—he being the clerk of the division in which the justices usually acted; but it is submitted that this section is not applicable, for it in terms applies only to cases in which a warrant of distress has issued.

Powell in support of the petition. The facts appear on the petition. After the passing of the Scab in Sheep Act of 1861 (b), sheep were brought across the boundaries of the colony, in contravention of the 14th section, by one *Scott*; the plaintiff laid an information against *Scott*, and he was convicted; but the magistrates directed the moiety of the fine, to which the plaintiff was entitled, to be paid to the clerk of Petty Sessions, who has embezzled it. The plaintiff claims relief, on the ground that money to which he is entitled has been actually paid to an officer of the Crown; and his claim is rather in the nature of an action for breach of contract than in tort. It is submitted that the justices made a proper order under the 31st section; and that as the clerk of Petty Sessions is a public officer, he is not personally liable for a contract entered into with him in his public character; *Macbeath v. Haldimand* (c). This

(a) 11 & 12 Vic., c. 43.

(b) 24 Vic. No. 9.

(c) 1 T. R. 172.

money having therefore been properly paid over to the clerk of Petty Sessions, in pursuance of the order of the justices under that section, no action of debt for the penalty would lie against *Scott*. [*Wise*, J. That section applies where a distress has been sued out; but if the party chooses to pay the penalty without a distress being levied, he is bound to pay the right person (a).] He also referred to *Tobin v. The Queen* (b), *Holmes v. The Queen* (c), *The case of the Bankers* (d), and *Broom's Maxims* (e).

The *Solicitor General* in reply. The money was not received by the clerk of petty sessions to the use of the Crown, but to the use of the informer.

STEPHEN, C.J. The recent statute (f) substitutes a new procedure for the obsolete and inapplicable procedure by petition of right; it gives a new remedy, but leaves the liabilities and rights of the Crown just as they were before. The question is, whether the suppliant has shown a legal right as against the Crown? It is a claim against the Crown by an informer and prosecutor, under the Scab Act (24 Vic., No. 9), who insists that he has a right to recover from the Crown itself one-half of the penalty imposed by the justices—he being entitled to it under the 15th section of the Acts Shortening Act. The whole of the penalty was paid under the direction of the justices to the clerk of Petty Sessions—he being the “clerk of the division” in which the justices usually acted.

It is said that the government is responsible in some degree, because the government appointed the particular

(a) Mr. *Oke*, in his *Synopsis*, p. 170, referring to this section, says—“By this section the clerk to the justices of the division where the conviction or order is made, is now made responsible for the due appropriation of all penalties and sums, ‘according to the directions of the statute on which the information or complaint in that behalf shall have been framed,’ and in the forms of warrants of distress given by the statute, the constable is directed to pay the amount levied to the ‘clerk of the division,’ and where the same is paid to the gaoler after committal, he is to remit the amount to the clerk also.”

(b) 32 L. J. C. P. 216; 33 L. J. C. P. 199. (c) 31 L. J. Ch. 58.
(d) 14 St. Tr. 47. (e) p. 774. (f) 24 Vic., No. 27.

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person (who acted as clerk of Petty Sessions) to do the duty on that occasion ; I cannot see what difference it makes whether he was appointed *pro hac vice* or not. Clerks of Petty Sessions are public officers, because they are appointed by the Governor and paid from the Treasury; but they are no more public officers than the justices are. The money, in my opinion, was paid to the clerk as the servant or agent of the justices, but not as the agent or servant of the government. If it got into the hands of the clerk of Petty Sessions legally, it was as the agent or servant of the justices ; if illegally, it was not as the agent of the government ; and it may have been paid by the payer *Scott* in his own wrong.

It appears further, that the colonial government not adverting to the fact that one moiety of this penalty belonged to the plaintiff, remitted the whole on certain equitable grounds ; but that in the meantime the clerk had embezzled the money, and that neither it nor any part of it had ever been paid over to any body. I do not think that that makes the government responsible. May not the plaintiff's remedy be against the convicted defendant ? Is he not still liable ? The government has no power to take from the informer his share of the penalty ; the government has no control over it. I do not say that the government would not have been liable, if the money had been paid back to *Scott* ; possibly it might have been ; but the money has not been paid back, for at the time the order to return the money was given, the clerk absconded and embezzled it. The Crown, therefore, has made an illegal order that this money should be returned; but it has not been returned; and neither the abortive direction of the government as to the money, nor the embezzlement of the clerk, give, in my opinion, the plaintiff a right of action against the government.

WISE, J. It is not necessary to consider the limits placed on the right of the subject to recover against the Crown by the recent statute. The facts of this case are, that a person was convicted under a statute, and the

plaintiff who was the informer was entitled to receive half the penalty. The plaintiff says that the government is liable to him for the money, because the clerk of Petty Sessions has received it, and he cannot get it from him. I will assume, for sake of argument, that this order of the justices—that the fine should be paid to the clerk—was a right order; and that the latter received it clothed with a statutory duty, under the 31st section of the 11 and 12 Vic., c. 43. It is of growing importance that the distinction between the executive and legislative powers should be observed. It is a mistake to suppose that the executive can do all things; and it is clear that the government had no power to take this money from the informer, except by due course of law. In *Dale's Case (a)*, a clerk of Petty Sessions was indicted for refusing to pay over a moiety of a fine, inflicted by justices for a breach of the English Alehouse Act, to the person entitled to receive it, and was convicted. In the present case it was the duty of the clerk of Petty Sessions, when he received the fine, to pay one half of it to the informer. After the conviction, the government directed the return of the penalty to the party who had been convicted; but it had no power to give back that moiety which was already vested in the informer. The embezzlement of this money by the clerk is immaterial. The money was in the clerk's hands for the informer, and it was his duty to pay it over to him. If it was misapplied by the clerk, his bond or that of his sureties may be forfeited; but the government is not responsible. The informer clearly has his remedy against the clerk, either by action of debt or by indictment. If it was an illegal payment to the clerk of Petty Sessions, on which I gave no opinion, I do not see how the payer has freed himself—for he must discharge himself by paying the amount to the person rightly entitled. The person entitled also can sue the person who has received the money to his use. A duty is imposed on the person convicted to pay the money, and

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an action of debt will, therefore, I should think, be against him ; but no action will lie against the government.

Judgment for the Crown.

Dec. 2, 6.

THE QUEEN *against* SOLOMON COHEN (a).

In a trial for perjury, alleged to have been committed in a case where the prisoner (as a member of a company) was sued by one *Berryman* under the Masters and Servants Act, for wages accrued due since the preceding April, the prisoner swore that he never was a member of the company in question. Held that the evidence was material, and that perjury could be assigned upon it. It was proved that there was a written complaint and summons, but neither were produced ; but a minute book which contained an entry—“*Berryman v. Cohen*.”

Wages. Plea, never indebted—and also the whole of the depositions of the witnesses signed by them, and the sentence of the justice signed by him, was received in evidence to show that there was a case pending, over which the justices had jurisdiction. Held that the evidence was properly admitted.

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• “**Q**UESTIONS reserved for the consideration of the Supreme Court, on the application of *Mr. Innes* (counsel for the said *Solomon Cohen*), by *Samuel Frederick Milford*, the Judge before whom the said *Solomon Cohen* was convicted, at the Circuit Court of Bathurst, held on the 10th of October, A.D. 1864.

The said *Solomon Cohen* was indicted for perjury committed before a stipendiary justice of the peace, on a complaint made by one *George Berryman* for the payment of wages, alleged to be due to him by the said *Solomon Cohen*, when he swore amongst other things that he never was a shareholder in a certain gold mining claim called the “*Better Late than Never Claim*,” otherwise called the “*Engine Claim*,” and that he never paid any wages on account of the said claim, or authorised any person to do so, and was convicted on the trial.

The summons by which the said *Solomon Cohen* was called on to appear before the said magistrate, on the complaint made before him for wages, was not produced in evidence, neither was the complaint made by the said *George Berryman*; but a book was produced containing the title of the case—*Berryman v. Cohen*, “*Wages*”—with the depositions of witnesses signed by them, and the decree or sentence of the magistrate signed by him, and the whole signed by the clerk of Petty Sessions. The claim made before the magistrate was for wages due

“*Plea, never indebted*”—and also the whole of the depositions of the witnesses signed by them, and the sentence of the justice signed by him, was received in evidence to show that there was a case pending, over which the justices had jurisdiction. Held that the evidence was properly admitted.

to the claimant from the preceding month of April; and the said *Solomon Cohen* swore that he never was a shareholder in the said claim.

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Mr. *Innes* requested me to reserve the following questions for the consideration of the Court:—First, that the minutes of the Petty Sessions should not have been admitted in the absence of the complaint and summons, both of which were proved to be in existence. Second, that the alleged perjury was upon an immaterial matter, inasmuch as the claim being only for wages, alleged to have been earned from April only; it was therefore immaterial for the defendant to swear that he (the defendant) never was a shareholder, for had he been a shareholder up to the end of March, nevertheless, he could not have been liable for his claim.

I have reserved the said questions accordingly.

SAMUEL FREDERICK MILFORD."

Isaacs (*Innes* with him) for the prisoner. It is submitted that the question, whether or not the defendant was ever a shareholder, was altogether immaterial; inasmuch as the subject matter of the inquiry then before the Court, namely, an indebtedness for wages in April, arose after the defendant ceased to have anything to do with the company. It could only be material whether he was a shareholder in April. *R. v. Griepe* (a), *R. v. Benesech* (b), and *R. v. Duston* (c) were referred to (d).

The minute book, without the production of the plaint and summons, was inadmissible. It was necessary to show a judicial proceeding before a competent Court, and this book was not a sufficient record. The written claim should have been produced. How can the Court tell without it what was the particular claim? or what wages, and how accrued due from the defendant, and when and how? Under the 11th section of the Masters and Servants Act (e), an information or summons is necessary; and it was admitted at the trial that such documents

(a) 1 *Ld. Raym.* 265.

(b) *Peake C.* 93.

(c) *Ry. & M.* 109.

(d) See 3 *Greenleaf* 206.

(e) 20 *Vic.*, No. 28.

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existed, and this book cannot be received in substitution for these documents. This objection was allowed to prevail in the recent case of *R. v. Hurrell* (a). In *Smith's Case* (b) the Court held that the record, or a copy of it, was the proper evidence. [Wise, J. That was before a Small Debts Court.]

Butler for the Crown. It was proved that no other book than this minute book was kept; and it was given in evidence, not to show what the witnesses in the case before the justices swore, but to show merely that there was a case pending, over which the justices had jurisdiction. The Court was not a Court of record as in *Smith's Case*. In which case also no record was produced at all. In *R. v. Yeoveley* (c), the proper book of the Court of Sessions, containing the minutes of each sessions, was held to be admissible—it being shown that no other record of a more formal character was kept. In Courts of inferior jurisdiction and not of record, their judgments may even be proved by an officer of the Court or other person, if it appear that there is no entry of them

(a) 3 F. & F. 127.

(b) 22 December, 1858.—This was a conviction for perjury, committed before justices in Petty Sessions, at Camden. The first question was, whether some record of an action or suit in the Petty Sessions Court ought not to have been produced, whereas the whole of the evidence against the prisoner was oral. The second point was, whether the Petty Sessions Court had any jurisdiction; the cause of action being a promissory note for £12, and the plaintiff reducing his claim to £10, in order to bring the case down to the amount.

Windeyer, for the prisoner, relies on 10 Vic., No. 10, ss. 4 and 11. In every case the production of the record is necessary. The following cases were referred to—*R. v. Browne*^{*}, *Porter v. Cooper*[†], *R. v. Storl[‡]*, *Thomas v. Ansley*[§], and *Fisher v. Lane*^{||}.

Dalley, S. G., for the Crown. No record here was kept; he relied on 16 Vic., No. 18, s. 20.

Per Curiam. On the first point the Court held the conviction wrong. The statute enacts that every suit shall be commenced by plaint in writing, and that the Court shall be one of record. Therefore the record or a copy of it should have been produced. On the second point the Court gave no judgment, but was inclined to think that the Court had no jurisdiction. There was no record of any abandonment of the £2, and no provision in the Act for cases of abandoning any excess, wherefore the prisoner must be discharged.

(c) 8 A. & E. 806.

^{*} 3 C. & P. 572.

[†] Id. 489.

[‡] 6 C. & P. 357.

[§] 6 Esp. 90; Id. 82.

^{||} 2 W. Bl. 834; 3 Willa. 297.

in any official book; *Dyson v. Wood* (a), *Manning v. Eastern Co. R. Co.* (b). It was also unnecessary to produce the complaint, which was a mere notification to the other side, as the warrant in *Arundell v. White* (c). In *Hurrell's Case* (d), neither the charge book or summons was produced. He referred to *Dawson v. Gregory* (e), *Howliston v. Smyth* (f), and cases cited in *Taylor* on Evidence (g). On the question of materiality, he referred to *R. v. Phillpotts* (h), and *R. v. Gibbons* (i); in the latter case it was decided that perjury can be assigned on evidence of a witness which is pertinent to the enquiry, although it may be legally inadmissible, if the witness be allowed to give the evidence.

STEPHEN, C.J. By the 8th section of Sir *John Jervis' Act* (k), No. 2, no complaint for wages,—no complaint upon which an order for the payment of money might be made,—need be in writing. But in fact the complaint here was in writing, and there was a written summons; but neither were produced. It was plain that the book produced was the only one kept; and that the proceedings before the justices in cases of this kind were kept in this mode, and contained the particulars appearing in this book. Independently of this, it was plain that *Cohen* (the defendant), in the case before the justices, appeared—and the assignment of perjury was in the evidence then given by him, so that no evidence whatever of any summons or complaint was necessary. The whole of what was sworn by the defendant and by the complainant was put in evidence, having been reduced to writing and signed by the parties and the justice. The entry in the book was thus—“*Berryman v. Cohen. Wages. Plea, never indebted.*” In *R. v. Browne* (l), the *nisi prius* record, with the minute of the verdict endorsed on it by the associate, was admitted to show the trial at *nisi prius*. In the present case this

(a) 3 B. & C. 447.
(c) 14 East 224.
(e) 7 Q.B. 756.
(g) *es.* 1407, 1408.
(i) 31 L.J.M.C. 98.

(b) 12 M. & W. 237.
(d) 3 F. & F. 271.
(f) 2 C. & P. 25.
(h) 21 L.J.M.C. 18.
(k) 11 & 12 Vic., c. 43.

(l) 3 C. & P. 572.

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minute book was the best and only evidence, there being no record; and in my opinion it was clearly admissible. But why were not the provisions of the Evidence Act of 1858 (a), sect. 8, attended to? By that section, in every case civil or criminal, in which it shall be necessary to prove that any particular cause or case or matter was tried, or under inquiry in any Court, or before any Judge or justices or justice, a like certificate under the hand of the officer having ordinarily the custody of the records or documents and proceedings, shewing the pendency or existence of such cause, &c., shall be taken as evidence of the fact of such trial or inquiry, and of the particular nature and occasion or ground and cause thereof, if stated in such certificate. Provided that the time and place of such trial or inquiry shall be stated therein, with the title of the Courts in which, or the name of the justice by or before whom, the same occurred, or was had or pending. I think the clerk ought to have made himself acquainted with this statute, and have given a certificate as therein provided.

The question, whether the prisoner ever was a member of the company, was material; for if he had never been so, he was not liable—and although he would cease to be so, except under particular circumstances, on ceasing to be a member, yet the question of his liability to the complainant might depend on other considerations than the prisoner merely ceasing to be such member. This case is distinguishable from *Benesech's* Case, where the perjury assigned was denying a promise, which promise was void for being oral only. For in that case, for the purposes of the suit in question, it was wholly and necessarily immaterial whether there was a promise or not, since no conceivable number of oral promises could establish or tend to establish the fact of there having been a written promise. Here, however, the fact of the prisoner having been once a partner was conclusive, unless he could show that he had ceased to be one.

(a) 22 Vic., No. 7.

WISE, J. I shall add nothing on the question of the materiality of this evidence, for I cannot understand the objection.

On the other question, there being an information for perjury upon the hearing of a complaint before a justice, it became necessary to prove that there had been a complaint before the justice. Afterparol evidence had been tendered, it was objected that the written summons was not produced. It seems to me that there was no necessity for any summons at all—for, unless the statute requires a written summons, the appearance of the defendantcures the absence of the summons. In *Paley* on Conviction (a), it is laid down that "if the defendant appears, any irregularity in the summons, or even the want of a summons altogether becomes immaterial, except perhaps in a case where a special form of summons is required by the Act, which has not been complied with." The law is not altered by Sir *John Jervis*' Act. I should have thought that it would have been sufficient in this case to have shown that there was a claim for wages, that the defendant appeared, and that this evidence was given. The minute book was not given in evidence in lieu of proving what was sworn, but to show that the issue had been tried. I think the book was unnecessary evidence; but the entry in it was clearly evidence of the fact that the case referred to had come on to be heard.

Conviction sustained.

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(a) p. 80.

December 15. In the matter of the administration of the goods, chattels, credits and effects of HENRY CARVELL, deceased, and of the Real Estates of Intestates Distribution Act of 1862.

An application under the third section of the Real Estate of Intestates Distribution Act of 1862 may be by petition and in a summary way, and without the necessity of a suit for the administration of the estate.

THIS was a petition by *Henry Prince*, the administrator of the estate of *Henry Carvell*. It appeared from the petition which was supported by affidavit that *Henry Carvell* died on the 24th November, 1863, and that letters of administration had been granted to the petitioner, who was a creditor of the deceased. That the petitioner took possession of certain real and personal property of the deceased, which was more than sufficient to pay his debts; that he had paid such debts, filed and passed his accounts, and that £30 13s. 4d. and certain real estate remained in his hands, not immediately required for the purposes of the estate. The petition then stated that one *John Carvell* had applied to the petitioner for the balance of the money, and for a conveyance of such real estate, representing that he was the heir at law and sole next of kin of the intestate, and that he supported such representation by declarations by the maternal aunt and two maternal uncles of the said *John Carvell*, in which it was alleged that the intestate had married the sister of the declarants; that they were present at the marriage, which took place in Ireland, in November, 1816, by the Roman Catholic priest of the parish; that two of the declarants signed their names as witnesses to the marriage register; that the deceased and their sister lived together for a year, but having quarrelled they lived apart for several years till about 1826, when they again came together; that prior to their separation the wife of the intestate bore one child, who died an infant; and that in 1828 she bore another child, a son; and that in 1830 the intestate emigrated to Australia, where he remained till his death in 1863, leaving his wife and child in Ireland; that the wife died in

1840; and that *John Carvell* was the said son. There were also certificates, signed by the parish priest, of the marriage referred to, and of the baptism of *John Carvell*.

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deceased.

The petition then prayed that his Honor would be pleased to give to the petitioner his Honor's opinion, advice, and direction, respecting the management and administration of the said real and personal estate, in reference to the question of the propriety of the petitioner, under the circumstances, conveying the real estate and transferring the personal estate of the intestate to the said *John Carvell*; or whether the petitioner should sell the real estate, and pay the produce together with the balance of the personal estate into the hands of the curator; and that his Honor would be pleased to give such further advice and direction as might seem best in regard to the administration of the property for the greatest advantage of all persons interested.

The petition, as originally framed, was also entitled under the "Trust Property Act of 1862" (a). But when the application came before the Primary Judge, he recommended that the petition should be amended by striking out that portion of the application, and that the question should be discussed merely in reference to the Real Estates of Intestates Distribution Act of 1862 (b); and his Honor entertaining some doubt as to the construction of the latter statute, referred the matter to the full Court.

Wilkinson for the petitioner. The question is whether the Court or the administrator in his own discretion is to control or sanction the appropriation of the real estate to the next of kin or other person; and whether a suit is necessary or a summary application is sufficient. It is submitted that the administrator is entitled to a direction of the Court for his own protection. *The Archbishop of Canterbury v. Tappen* (c) is a distinct authority that the administrator is not, by the condition of the bond

(a) 26 Vic., No. 12.

(b) 26 Vic., No. 20.

(c) 8 B. & C. 151.

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given in pursuance of the Statute of Distributions, bound to distribute the surplus of the intestate's estate after payment of debts, &c., until a decree directing him so to do has been made by the Court. "It appears," says Lord *Tenterden*, in giving the judgment of the Court, "that the ordinary or Judge is to make the distribution among the persons entitled, and that the administrator is to pay according to the sentence of the ordinary, so that the sentence of the ordinary is to precede the payment. And this may in many cases be necessary for the information and protection of the administrator, who, where the claimants are numerous and remote in kindred from the intestate, may not know with certainty what particular persons are entitled, or in what proportions, and may, if he pays to a person not entitled, be obliged to pay over again to the person legally entitled." The same doctrine is recognised in the *Archbishop of Canterbury v. Robertson* (a). The bond given in this colony is substantially the same as that required by the Statute of Distributions, except that in that bond the last part of the condition is to pay to such person as the Judge, by his decree or sentence, shall limit and appoint; whereas in this, it is "in due course of administration, or in such manner as the Court shall direct." His Honor Mr. Justice *Wise*, in a judgment delivered by him in *In re Thompson's Will* (b), in which the Ecclesiastical jurisdiction of this Court is much considered, says, "under sect. 17 of 4 G. IV, c 96 (c), accounts are to be passed from time to time, and the balance to be paid as the Court shall direct for safe custody; a power which I believe does not exist in the Ecclesiastical Court in England; orders are to be made for the administration of the assets, for payment to creditors and persons entitled as legatees, next of kin, or by any other right or title whatsoever, wherever resident," showing, as it appears to me, that the Court was intended to be, so to speak, the guardian and protector of the interests of all parties to whom any rights should accrue by the death of the deceased. It is most reason-

(a) 1 C. & M. 690.

(c) The Charter issued under that statute.

(b) 3 July, 1860.

able that such a duty should have been imposed on the Court, where those interested would, by reason of their absence, so often be unable to protect themselves." The administrator is entitled to be relieved from the responsibility of deciding who is the person entitled to these assets; and, apart from the language of the recent statute, a duty is cast upon the Court to direct the proper appropriation of the intestate's property. He then commented on the language of the Intestacy Act, and contended that it indicated that the Court or Judge could entertain applications like the present in a summary way, without the expense and formalities of a regular suit.

Milford appeared for *John Carvell*. The Court will comply with the prayer of the petition, and not allow the remaining assets to be wasted in expensive litigation. The legislature intended, under this statute, that small Equity suits should be tried without the necessity of a bill and answer. If the statute does not clothe the Court with this power, it will be necessary to institute an equity suit in every case of intestacy, where there are real assets, however small those assets may be.

STEPHEN, C. J. It is our duty to carry into effect the provisions of this statute, for the benefit of those whom the legislature intended to favor, and I see no difficulty in the present case. The statute is badly drawn. It has made all real property personality, so that the administrator is to take possession of, and to deal with, it as personality. The rules therefore apply which formerly applied to the administration of personal property. Whereas in England a bond is given to the ordinary that the administrator shall deliver or pay unto such person as the Judge shall by decree appoint; here, the bond is taken that he shall pay and dispose of the goods, &c., in a due course of administration, or in such manner as the said Court shall direct. The administrator is entitled to ask to be protected; and under the Charter the Court can order this land, now made personality, to be disposed of to the person entitled. If the

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administrator came before us when there was no necessity, he would not get his costs—perhaps he would have to pay them. In applications like the present, the Court or Judge must not take for granted that everything alleged is true; but must take proper steps to ascertain who is the person entitled. It might therefore be necessary to direct that advertisements should be inserted, or that enquiries should be made whether the debts of the intestate have been paid. In the present case the accounts have been passed; and as the next of kin must now take the land through the administrator, we direct that the administrator execute a conveyance to him, the present respondent. Incidentally to this jurisdiction the Court must have power to give the administrator his costs.

MILFORD, J. There are two matters mixed up in this case; one, an ecclesiastical suit—the other, an application under the recent Act. As to the first, there could have been a suit for the administration of the estate, and the Court would direct the assets to be paid to the party interested. As to the second, what are the proceedings to be taken under this Act? I thought at first that the Act was only to protect the estate until some right had been established *aliunde*. But on further consideration I am inclined to think that a summary proceeding, instead of a suit, can be instituted. What is the course to be pursued? It is plain that we must ascertain that all the proper parties are before the Court; that all debts have been paid; and, if a case of partial administration, as where the estate has been devised, who is entitled. In fact the Court must do the same thing as in a chancery suit. But no provisions are contained in the Act for officers to carry out these proceedings. It seems to me that until the rules are made, the Judge must exercise his discretion, and endeavour as best he can to ascertain the facts, which must be ascertained before the distribution takes place. If the application of the administrator, coming to ask for directions, is unnecessary, the Court will not direct his costs to be paid.

But if there is really a difficulty, or if the administrator cannot act with safety, and the Judge thinks the question fit for the decision of the Court, the Court has power as administering the estate to pay his costs out of it. I think the statute contemplates that there shall be a sale, because it makes provision "until sale." But as the person entitled (whose title appears to me to be sufficiently established) asks that the land be conveyed to him, the Court can direct accordingly.

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WISE, J., concurred.

Order accordingly.

JAMES TYSON *against* JAMES McEVOY.

December 6.

SPECIAL case stated by consent, as follows:—

"This is an action brought by the plaintiff against the defendant, to recover £235 9s., being half the amount of the costs of a certain award, and the drawing and preparation thereof, and of the fees of the arbitrators and umpire, in the matter of an arbitration between the plaintiff and defendant hereinafter, more particularly mentioned.

The plaintiff and defendant being entitled to leases of Crown lands, and having claimed to be entitled under the orders in Council to a lease of the same land, the Minister for the time being charged with the administration of Crown lands required that the right of either claimant should be enquired into and determined by arbitration, under the provisions of the Crown Lands Occupation Act of 1861.

The plaintiff and defendant having failed to concur in the appointment of a single arbitrator to determine the said matter, the plaintiff on the 15th October, 1863, appointed *Robert Landale* as his arbitrator; and on the

he made his award. *Held*, not too late, he having (under the 6th and 8th clauses of sect. 23 of the Act) sixty days, with a power of extension to ninety days, for that purpose, from the time when he was enabled to enter on his duties by the retirement of the arbitrators from theirs, and not from the date of his formal appointment.

In an arbitration directed under the Crown Lands Occupation Act, the last of the two arbitrators was appointed on the 1st December, 1863; on the 28th December the two arbitrators extended their time thirty days, and on the 26th January, 1864, they appointed an umpire. On the 28th February, the two arbitrators finally differed; on the 20th April the umpire extended his time thirty days, and on the 7th May

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1st December, 1863, the defendant appointed *Nicholas Chadwick* as his arbitrator to determine the said matter.

Before the said arbitrators entered upon the matter of the said arbitration, and before they appointed the umpire hereinafter mentioned, they, on the 28th December, 1863, extended the time for the making of their award, for the period of thirty days.

Upon the 26th January, 1864, the said arbitrators appointed by writing under their hands *Robert Biggart Gow* to be umpire of the matter of the said reference.

Upon the 10th February the said arbitrators met for the purpose of proceeding with the said reference, and met daily for such purpose, and did proceed therewith until the 28th February, 1864, when the evidence adduced before them having closed, the said arbitrators were unable to agree upon the terms of the award to be made by them in the said matter, whereupon the said matter devolved upon the said *Robert Briggart Gow*, who had been present at and during the proceedings aforesaid, for his determination as such umpire as aforesaid.

The said umpire, upon the 20th April, 1864, appointed an extended time of thirty days for the making of his award.

The said arbitrators failed to make any award within the extended period appointed by them as hereinbefore mentioned; and the said umpire made an award under his hand, dated the 7th May, 1864, whereby amongst other things he awarded that the costs of the said award, including the drawing and preparation thereof, and the fees of the said arbitrators and of him the said umpire, should be paid by each of the said parties in equal shares or proportions; and in the event of one of the said parties paying in the first instance the whole amount of such last mentioned costs, the said umpire awarded that the other of the said parties should forthwith pay and reimburse one-half or moiety thereof to the party paying as aforesaid.

The plaintiff has paid the whole of the costs herein-

before mentioned, and the said sum of £235 9s. is one-half part thereof.

The defendant has been compelled by the said minister to enter into the matter of the said arbitration ; and such arbitration has been entered into as aforesaid, and every step therein as aforesaid conducted against the consent and under the protest of the defendant.

If there be any irregularity in the making of the said award, or if there be any invalidity therein, the defendant has in nowise, either expressly or impliedly, acquiesced in such irregularity or invalidity.

It is contended by the defendant that the time for making the said award was not duly extended ; and further, that the said award was not made in due time under the provisions of the said Act ; and it is contended by the plaintiff that the time for making the said award was duly extended, and that the said award was made in due time.

If the Court shall be of opinion with the defendant, the verdict is to be entered for him, otherwise for the plaintiff for the above mentioned sum of £235 9s."

Isaacs appeared for the plaintiff, and Sir *William Manning*, Q. C., for the defendant ; but the arguments can be gathered from the following statement in writing of the reasons given by their Honors for their judgment (which was given orally) in the above case, pursuant to the 8th rule of the order in Council regulating appeals to the Privy Council. *Skerritt v. The North Staffordshire Railway Co.* (a), *Bradshaw's Arbitration* (b), and *Doddington v. Bailward* (c) were referred to.

The statement was as follows :—

The question in this case is whether the award of an umpire in the plaintiff's favour, under a compulsory reference to arbitration directed by the Minister for Lands, in pursuance of the Crown Lands Occupation Act, section, 4, was made in due time according to the provisions of the same Act, section 23. We were of

(a) 2 Ph. 475 ; 17 L.J. Ch. 161. (b) 12 Q.B. 575.
(c, 7 Dowl. 640 ; S.C., 5 B.N.C. 591.

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opinion in the affirmative on that question and gave judgment accordingly for the plaintiff—from which (the matter indirectly involved exceeding largely in value the limit in that behalf) the defendant has appealed to her Majesty in Council. It becomes our duty, therefore, to state in writing the reasons for that opinion and judgment; and they are as follows:—

Section 23 of the Lands Occupation Act has several subdivisions, respecting the mode of appointing the arbitrators and umpire, on reference under that statute, and the extension of time by them respectively for making the award or umpirage, and prescribing (or purporting to prescribe) the time within which such award or umpirage must be made. And the question—for substantially there is only one, although two are stated in the Special Case—arises on the 8th and 6th of those subdivisions; no objection having been raised, or point made, other than that already mentioned by us, and there is in effect no separate question as to the extension of time, in this case, by either the arbitrators or the umpire. The extension by the former (each class alike having sixty days allowed for making the award, with power to extend for thirty more), was shortly after their appointment; and the extension by the latter, which was confessedly more than sixty days after his, is sustainable or not according as the one point in contest is decided—namely, whether that period runs from the date of such appointment, or from the time when the umpire is enabled to enter on his duties, by the retirement of the arbitrators from theirs.

The reference in this matter having been directed, as already mentioned, the parties failed to concur in the selection of a sole arbitrator, and two were duly appointed; the second on the 1st December, 1863. On the 28th, before entering into the case, both joined in extending the statutory time to its full limit. On the 26th January following, they appointed an umpire; and, on the 10th February, commenced the business of the reference—terminating on the 28th of the same month, when their ninetieth day expired, without a decision.

The umpire thereupon assumed the duty; but, until the 20th April, when he extended the time for his umpirage (or assumed so to do) thirty additional days, he seems to have taken no active step in the matter. On the 7th May, however, he made his award; being the umpirage in question. So that if this gentleman had by law sixty days from the 28th February, his extension of the term operated from the day of their expiry, and the united period did not end until the 28th May.

But the defendant insisted, and still insists that by the enactments relied on, every arbitrator (the umpire included) has only sixty days from the date of his appointment, literally so taken; and consequently (that date having been the 26th January) the ninety days expired in April, and the umpirage was void. In our opinion, on the contrary, those enactments, however inaccurate or incomplete, and on that score open to criticism, ought—for the reasons presently given—not to be so construed.

The words of subdivision 8 of the 23rd section, omitting all which affect appraisements, are these:—

“In case arbitrators fail to make their award within sixty days after the day on which the last of them was appointed (or within such extended time not exceeding thirty days, as shall have been duly appointed by them for that purpose), the matters referred shall be determined by the umpire, and the provisions of this Act with respect to the time for making an award, and with respect to extending the same in the case of a single arbitrator, shall apply to any umpirage.”

We then refer to the 6th subdivision, to ascertain the provisions enacted with respect to a single arbitrator; and the words there are as follows:—

“In case a single arbitrator die, or become incapable to act before the making of his award, or fail to make his award within sixty days after his appointment, or within such extended time, not exceeding thirty days, as shall have been duly appointed by him for that purpose, the matters referred to him shall be again referred to arbitration as if no former reference had been made.”

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Now, however unambiguous in themselves these words, "after his appointment," may be, and however unembarrassing as applied to a single arbitrator, selected by the litigating parties, the literal construction contended for by the defendant, when the words are looked at with respect to an umpire and his appointment, leads obviously to the most inconvenient if not absurd results—such as, it is quite clear, the legislature could never have contemplated. The reasonable inference is, that each tribunal was intended to have in every case sixty days for its task; each also being allowed a separate power of extending the time respectively thirty days more. But, by construing the statute literally, this intention would often be defeated. And for what conceivable reason should the umpire's time commence from the date of his nomination merely? An umpire has no authority, he is (so to speak) not clothed with his office until the abandonment of their functions by the arbitrators. In the present case, however, there had already elapsed at that time thirty-three days, reckoning from the 26th January. But if an umpire's appointment by the arbitrators be immediately after their own—the statute directing that it shall take place before entering on the reference—he might have no time allowed at all for the discharge of his duties; his own and the arbitrators' sixty days expiring concurrently. If made a few days after their appointment, the umpire's time (without an extension by him) would be no more. And if, after thus appointing him, the arbitrators should in either of the cases supposed extend their own time, so as to overlap that assigned to the umpire, he would be effectually excluded altogether.

We were and are of opinion, therefore, that the word "appointment," in subdivision six of this section, when applied to an umpire must be taken to mean his effectual appointment, that event which for the first time makes him (or alone enables him to act as) umpire; not his formal appointment or nomination, to take effect only on an event which might never happen. And this view is strengthened by considering the effect of another portion

of the enactment. For it can hardly be said, that the umpire "fails" to make his award within a stated time, unless he has had all that time for the purpose. The umpire's task cannot commence, until he has acquired the authority; and from that time only, therefore, the period limited for his accomplishing it commences.

The decision, no doubt, may appear a bold one; for certainly the legislature has not in termssaid, that which we neverthelesshold that it intended to say. And moreover the same word, in the same sentence, is thus made to mean two things; that which is literal, as applied to an arbitrator—and that which is only "appointment" by construction, when applied to the case of an umpire. But our judgment seems to us fully warranted, by the cases of *Skerrett v. North Stafford Railway* (a), and *Bradshaw v. Birmingham Junction Railway* (b), cited on the argument, and to which we now respectfully refer.

Sir *W. Manning*, Q.C., for the defendant, now moved for leave to appeal to the Privy Council. The affidavit in support of the motion stated that although in terms the special case related only to the costs of the award, yet in fact the matter involved was a right of lease of a station, a right worth very much more than £500, since the award is in the plaintiff's favor as to the right in question.

Isaacs, for the plaintiff, contended that as the only question in dispute on the special case was one respecting £235 9s., the Court could not look beyond the case; and, secondly, that the award was perhaps not binding on the Crown, and if so, there was no decision of a binding character respecting the right to a lease.

STEPHEN, C.J. I think we ought to grant leave to appeal, and that the case comes within the second section of the order in Council. Although the award or um-

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Although the sum in issue was less than £500, leave to appeal to the Privy Council allowed, as the judgment indirectly involved a claim respecting property amounting to that sum.

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pirage should not be conclusive on the Crown, it is sufficient in my opinion that it is conclusive on, and final between, the parties; and, therefore, the point decided by us certainly involves, directly or indirectly, a claim or question to or respecting property above the value of £500.

WISE, J. I agree that the leave to appeal should be granted, on the assumption that the award is binding. It seems to me to give an inchoate right to obtain a decision of the Crown. If it were not binding, I should think the appeal would not lie.

KOSTEN against HAIGH.

In an action of ejectment, there being a dispute at the trial whether the land claimed was rightly described in the writ, the Judge was asked to amend, but refused, because the evidence made it uncertain whether in fact the land was or was not wrongly described; and in lieu of amending, he directed jury to find the

facts specially; and they found accordingly that the land really in contest was known to the defendant, and that the defendant came prepared to defend for it, and that it was the property of the plaintiff, and the jury described it by marks on a plan. The Court on motion ordered judgment to be entered for the plaintiff on the whole record, under the 5 Vic., No. 9, s. 38.

Afterwards and before *habere* executed, the plaintiff commenced a new action against the defendant for damages, on which was endorsed a notice of his intention to claim a writ of injunction. An injunction having been ordered to issue, the Court, on motion to dissolve the injunction, made the rule absolute.

EJECTMENT. At the trial before *Stephen*, C.J., on the 22nd of August, there was much dispute whether the land claimed had been rightly described in the writ, and whether a particular corner of the allotment in question was the north-west or the north-east corner. The learned Judge was asked to amend, but refused to do so, because the evidence made it uncertain whether in fact the land was or was not wrongly described; and, in lieu of amending, asked the jury to answer the following questions:—

Do you find that there is a piece of land in controversy between the parties in this action, the boundaries and position of which were known to the defendant at and before the commencement of this trial? Yes.

Did the defendant come prepared to defend the action in respect to that piece of land? Yes.

Has the plaintiff established his title to that land ?
Yes.

What is the piece of land in question ? The piece of land marked G. F. E. H. on the plaintiff's plan, signed by us.

Is that land described on the record with reasonable certainty ? Considering the evidence given by the surveyors, who have been examined as witnesses in the case, we do not consider that the land has been described in the writ with sufficient certainty.

Do you find for the plaintiff or defendant ? For the plaintiff.

Butler now, for the plaintiff, moved that judgment September 7. might be entered for the plaintiff, under the 38th section of the 5 Vic., No. 9, which provides that in all cases of variance between the proof and the record, in any action at law hereafter depending in the Supreme Court, it shall be lawful for the said Court or the Judge before whom the trial is had, if such Court or Judge shall think fit, instead of causing the record or document on which such trial is proceeding, to be amended at such trial, as by the rules and course of practice of the said Court is now provided in that behalf, to direct the jury or assessors (as the case may be) to find the fact or facts according to the evidence ; and thereupon such finding shall be stated on the said record or document ; and notwithstanding the finding on the issue or issues joined, the said Supreme Court shall thereafter, if it shall appear to the said Court that the variance was immaterial to the merits of the case, and such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the right and justice of the case. In ejectment, an exact description of the premises is not necessary; but the plaintiff is to show the sheriff, and to take possession at his peril of that only to which he has a title; *Cottingham v. King*(a).

(a) 1 Burr. 629.

* Before *Stephen*, C.J., *Milford*, J., and *Wise*, J.

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Isaacs contra, referred to Guest v. Ellis (a), and Bond v. Hodges (b).

Per Curiam. We order that the special finding of the jury be entered on the record, and that the plaintiff have judgment for the piece of land described by the jury and pointed out on the map, which may be annexed to the record. In strictness, the verdict of the jury was this—that the plaintiff had made out no title to the particular land described in the writ, because, according to that description (which was by the points and bearings of the compass), a totally different locality was indicated. The verdict, therefore, in this state of facts, should have been for the defendant. But as we are clearly of opinion that the defendant knew what land was in contest, and came prepared to defend for it, and also that the variance in the description was such as was not material to the merits, and could not have prejudiced the defendant in his defence, we, therefore, under the statute 5 Vic. No. 9, s. 38, give judgment on the whole record for the plaintiff. Each party to bear his own costs of this motion and the argument thereon.

Afterwards, and before judgment was signed and possession obtained under a writ of *habere facias possessionem*, or before actual re-entry, the defendant proceeded to remove certain buildings from the land, which was the subject of dispute in the action of ejectment. On 31st August, the plaintiff sued out a writ of summons, claiming £500 for damages, on which was endorsed a notice of his intention to claim a writ of injunction under the 44th section of the Common Law Procedure Act of 1857 (c), to restrain the defendant, his workmen, &c., from taking down and removing buildings and fences of the plaintiff, erected on the land of the plaintiff, situated, &c., and claimed by plaintiff in this action. And on the same day an injunction was, on the plain-

(a) 5 A. & E. 118.

(b) 18 L.J. Ex. 435.
(c) 20 Vic., No. 31.

tiff's application, ordered to issue by *Stephen*, C. J., restraining the defendant from removing certain buildings, &c., from the premises in question.

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Isaacs and *Milford* now moved to set aside the summons, and to discharge the writ of injunction; on the ground, first, that the affidavit in support of the summons was not filed till after the order was made, although the order speaks of it as if then actually filed; and secondly, that the writ of injunction cannot issue in an action of ejectment, and therefore cannot issue in this action. It was submitted that this new action was really brought to evade the rule laid down in *Baylis v. Legros* (a), and thus enforce or supplement his verdict in ejectment without waiting to obtain possession under the *habere*. It has been doubted whether it is lawful to take possession of property recovered in ejectment without suing out a writ of *habere*, *Doe v. Lord* (b); although in *Wilkinson v. Kirby* (c) it seems to have been considered immaterial.

Butler showed cause. [*Stephen*, C. J. There is nothing in the first point. On the second point, does not a person by bringing ejectment admit that he is out of possession? If so, is there anything to show that this plaintiff has been in possession since he brought his action of ejectment? and how then can he maintain an action of trespass? And will the Court grant an injunction when it is clear that the plaintiff must fail in the action?] It is submitted that the plaintiff may be in possession, and yet sue in ejectment to try the question of title; or that after entry, or the execution of an *habere*, the plaintiff's right of possession relates back so as to support the claim for damages, for trespasses committed at any time antecedent to the issue of the summons; *Barnett v. Earl of Guilford* (d). [*Stephen*, C. J., referred to *Roseoe* on Real Actions (e).]

(a) 26 L. J. C. P. 176; 7 Jur. N. S. 795.

(b) 7 A. & E. 610. (c) 15 C. B. 430; 23 L. J. C. P. 224.

(d) 11 Exch. 29; 24 L. J. En. 281. (e) p. 705.

* Before *Stephen*, C. J., and *Wise*, J.

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STEPHEN, C. J. It is a novel point and not free from difficulty. For although at present the plaintiff cannot prove actual possession, yet, after *habere* executed, the plaintiff would be in possession by relation as of his old estate, and so could show such actual possession from a date anterior to both the actions of ejectment and trespass. But I think that the plaintiff cannot possibly succeed in this present action. There is no evidence that things are different at the present time from what they were. When this action was brought, there had been no actual re-entry, and no judgment executed; and that being the state of things, the plaintiff could not recover in an action of trespass, and therefore the injunction, which is an auxiliary to an action, would not lie either.

WISE, J., concurred.

Order accordingly.

February 10.

Ex parte BOLDING (a).

The tenth section of the 11 and 12 Vic., c. 44, is in force in this colony, and therefore no action can be brought in any District Court against a justice of the peace for anything done by him in the execution of his office, if such justice objects thereto (per *Milford*, J.).

WINDEYER moved to make absolute a rule nisi for a prohibition granted by *Stephen*, C. J., to restrain one *Jacob* and the Judge and Registrar of the Hunter River District Court from further proceeding in respect of an action then set down for trial at East Maitland.

It appeared that an action in trespass and case had been brought in the Hunter River District Court by one *Jacob* against the applicant (a magistrate), for a certain thing done by the defendant in the execution of his office as a justice of the peace. The defendant had been served with the notice of action required by Sir *John Jervis*' Act, and was afterwards served with a summons and plaint. Within six days of the service of the summons, the defendant served on the plaintiff a notice, under the 10th section of the Act 11 and 12 Vic., c. 44, that he objected to being sued in the District

(a) In Chambers. Reported by *W. C. Windeyer*, Esq.

Court for the alleged cause of action. The plaintiff, however, informed him that he intended to proceed.

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Windeyer for the applicant. It is admitted that the District Court had originally jurisdiction to entertain a case of this character; but it is submitted that the notice given by the defendant has ousted that jurisdiction. The question is, whether the provisions of the Act respecting the notice "can be applied in this colony," as directed by 14 Vic., No. 43, s. 1? and he argued that the reasons against such an action being tried in an inferior Court held good here. Though the District Court Act was a later Act, he submitted that the Act should be construed as applying or not, as cases from time to time arose. The Chief Justice in granting the rule had refused a *certiorari*, on the ground that after the notice given there was, in his opinion, nothing to remove.

Sheppard for the plaintiff *Jacob*. The District Court has jurisdiction to try all personal actions, and no exception is made as to cases against justices, though 14 Vic., No. 43, s. 8, forbade their being brought in the Courts of Request. The provisions as to the notice can not apply in the colony, as there were no District Court in existence at the time the 14 Vic., No. 43 was passed.

MILFORD, J. Such a wide interpretation has been put upon Sir J. *Jervis*' Acts in previous judgments of the Court, making them applicable to this colony, that I think I am only following those decisions in holding that the provisions of the 10th section of 11 and 12 Vic., c. 44, can be applied in this colony. The question is not whether the District Court has jurisdiction to entertain such a case, but whether that jurisdiction has been ousted by the notice given by the defendant; and I think it has been. In this opinion, I am also supported by the view taken by the Chief Justice in granting the rule. As it is, however, a case of the first impression, I shall make the rule absolute without costs.

Rule absolute without costs.

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In re PERROTT.

The 4 G. III., c. 10, is in force in this colony, and the Supreme Court has, therefore, the same jurisdiction over forfeited recognizances as the Barons of the Exchequer in England.

WINDEYER moved on petition and affidavit that the recognizance entered into by the applicant might be discharged.

It appeared from the affidavit of the applicant that he had, in March, been bound over to appear as a witness in a case of manslaughter, which was to be heard at the Circuit Court at Maitland, in the month of October, and that not appearing his recognizance had been estreated. He had since been called upon to shew cause in Chambers, under the 31st rule of the Supreme Court Practice (a), why execution should not issue against him. *Milford*, J., however, held that he had no power to interfere.

It appeared from the affidavit filed by the applicant that at the time he was bound over, he was under an agreement to deliver a herd of cattle at Menindie, a distance of 1100 miles from Maitland; that he started in May, and that owing to the flooded state of the country he was unable to return to Maitland in time for the assizes.

Windeyer in support of the application. This is an application in the Exchequer jurisdiction of the Court. The Court has power at common law to discharge a party on the ground of poverty, *Manning's Exchequer Practice* (b); and a petition for this purpose may be framed under the provisions of the 4 G. III., c. 10, which, being an act in force at the time of the passing of the 9 G. IV., c. 83, is in force in this colony. On this point he referred to *Black Peter's Case* (c). From *Gude's Crown Practice* (d) it appears that "the Court of Exchequer have a writ of privy seal empowering them to mitigate, and also a discretionary power to relieve the

(a) p. 53.

(c) 1 Sup. Ct. R., C. L. 207.

(b) p. 319.

(d) 1 Vol. p. 231.

party therefrom altogether, by discharging the recognizance, which they will do when there are any equitable circumstances in the case." And by the 4 G. III., c. 10, that Court, upon affidavit and petition to be presented to them by or on behalf of the person imprisoned, or liable to be so, on the forfeiture of such recognizances, may discharge such person without any *quietus* to be sued out for that purpose; and by the 3 G. IV., c. 46, magistrates at general or quarter sessions are empowered to respite, mitigate, or discharge recognizances forfeited at the sessions. *In re Cartman* (a) is a case where an estreat of a forfeited recognizance was discharged on petition, under the 4 G. III., c. 10. The same jurisdiction was exercised by the Court of Exchequer in *R. v. Stancher* (b), where that Court refused to discharge the defendant, who had been committed to prison on a forfeited recognizance, on the ground that his family had thereby become burdensome to the parish. This discretionary power is transferred to the Supreme Court and the Judges thereof, by the 6 W. IV., No. 12 (c). *R. v. Thornton* (d) was referred to.

Per Curiam. We are of opinion that the 4 G. III., c. 10, is in force in this colony. The 3 G. IV., c. 46, and the 4 G. IV., c. 37, only relate to Courts of Quarter Sessions; but the powers conferred by the former Act (namely, the 4 G. III., c. 10) still exist, and this Court has all the powers of the Court of Exchequer, apart from the statute of 6 W. IV., No. 12. This Court, therefore, has jurisdiction over all recognizances imposed at this Court and Courts of Assizes, but not over those imposed at Courts of Quarter Sessions, or before justices out of sessions (e).

(a) 11 Price 637.

(b) 3 Price 261.

(c) 2 Cary 724.

(d) 19 L. J. M. C. 113.

(e) See *R. v. Justices of the West Riding*, 7 A. & E. 589; 2 Crabb's Digest of Statutes, 612; and 3 Id. 513.

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In an action by H., official assignee of the insolvent estate of D., it appeared that M. (now deceased) was the assignee originally appointed, and that the instrument appointing H., after reciting that H. had been appointed as, and to be, one of such official assignees, made him assignee in the place and stead of M. (deceased), of, in, and for all the insolvent estates of which M. was assignee at the time of his death. *Held*, that under the 7 Vic., No. 19, s. 12, the previous instrument, of which the recital unobjectionable to was evidence, in itself at once vested the several estates held by M. in H., and that H. was entitled to sue.

A PPEAL from the Metropolitan District Court. The plaintiff sought to recover £55 15s. 9d. under the common counts, for goods sold and delivered, goods bargained and sold, for work and labour, and on accounts stated.

The case was tried in Sydney, in September, 1864, when the learned District Court Judge non-suited the plaintiff on the following grounds, as stated in the case for appeal:—"First, that the plaintiff had not given sufficient evidence to show that he was the official assignee of the estate and effects of the said *John Duguid*; and, secondly, that there was nothing in the Insolvent Act (7 Vic., No. 19) to give the plaintiff the right as such assignee to bring an action in his own name, even allowing that the order made by the Chief Justice hereinafter mentioned was correct in form."

It appeared that an office copy of the order of the Chief Commissioner of Insolvent Estates, accepting the surrender of *Duguid's* estate, and placing the same under sequestration, and appointing *John Morris* (since deceased) to be the official assignee of such estate, was put in evidence—such office copy being under the hand of the said Chief Commissioner, and certified by him to be a true extract from the proceedings in such insolvent estate. It was then admitted that before the commencement of this action, and before the making of the order next mentioned, the said *John Morris* had departed this life, and that up to his death he continued to be the sole assignee of the said estate of the said *John Duguid*. An order made by *Stephen, C. J.*, was then received in evidence, which, after reciting that *John Morris* (lately one of the official assignees of insolvent estates, &c.), had departed this life, and that *F. T. Humphery*, &c., had been the managing clerk of *Morris*, and was conversant with the management and particulars of the various in-

solvent estates of which *Morris* was assignee at the time of his death, stated—"and whereas it having been made to appear to me that the said *F. T. Humphery* is a fit and proper person to be appointed an official assignee of insolvent estates in and for the said colony, I had appointed him as and to be one of such official assignees." The order then stated that it was desirable that *Humphery* should "be appointed official assignee of all such estates in the place of the said *John Morris*, deceased. Now, therefore, I, pursuant to the authority in me vested as Chief Justice, do, on the application of the Chief Commissioner of insolvent estates, order that the said *F. T. Humphery* be appointed, and I do hereby appoint him official assignee in the place and stead of *John Morris*, deceased, of, in, and for all the insolvent estates of which the said *John Morris* was official assignee at the date of his decease. Given, &c."

The appeal case then stated that the said learned Judge ruled and determined (and on such ruling the plaintiff was non-suited) that the before mentioned evidence was insufficient to show that the plaintiff was such assignee as aforesaid, inasmuch as the said order of the said Chief Justice was a general order, and did not specifically appoint the plaintiff assignee of the said insolvent estate of the said *John Duguid*; and that the plaintiff, even allowing he was properly appointed as such assignee, had no right as such assignee to bring this action in his own name. The question was, whether the ruling of the learned District Court Judge was right.

Isaacs for the appellant. The order of appointment was sufficient under the 7 Vic., No. 19, s. 12, which provides that the Chief Justice shall appoint such number of fit persons to be, and be called, official assignees of insolvent estates as may be required, and in case of resignation, death, &c., he shall appoint others in their place; and the Judge, by whom any estate shall be placed under sequestration, shall, "at the same time, by order under his hand, appoint one of the said persons as and to be the official assignee of and for such estate." The section then contains a proviso, that in case the official assignee so appointed shall die, "it shall be lawful for the Chief Justice to appoint another official assignee in his place, who shall thereupon succeed to all the rights, powers, duties, and liabilities of his predecessor."

Salomons for the respondent. The assignee of a *chose in action* cannot sue in his own name, unless authorized

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by statute; and it is submitted that the section referred to does not confer this power. That section contains two provisions; the first, enabling the Chief Justice to appoint official assignees generally, or rather to create a kind of college of official assignees, which appointment does not vest in them any particular estate; and the second, enabling a Judge to vest particular estates in any member of that college. It was necessary, therefore, in the first place, to appoint the plaintiff, generally, an official assignee, and then by a second appointment to vest in him all the estates vested in Mr. *Morris* at the time of his death, specifying such estates. As the order given in evidence only appointed the plaintiff official assignee generally, it was not sufficient. [*Wise*, J. I should think there was no occasion for any second order; for the proviso says that the Chief Justice shall appoint another official assignee in the place of one who is dead, "who shall thereupon succeed to all the rights, powers, duties, and liabilities of his predecessor." If, therefore, it was the duty of the predecessor to administer a particular estate, it thereupon becomes the duty of the successor.]

STEPHEN, C. J. I am clearly of opinion that the appellant is entitled to succeed. It appears that there was a previous instrument recited in the one relied on at the trial, and, therefore, of which previous instrument this recital (which was unobjected to) was evidence. This previous instrument, as appears by the recital, appointed the plaintiff "as, and to be, one of such official assignees," in the place and stead of *Morris*, deceased. We are of opinion that the non-suit was wrong; for such last mentioned appointment, in our opinion, as was suggested during the argument by Mr. Justice *Wise*, in itself at once vested the several estates held by *Morris* in the plaintiff, he being his successor. If the defendant had taken the true objection to this order, namely, that it was only secondary or hearsay evidence of the plaintiff's appointment as official assignee, the plaintiff might have met the objection, and probably would have done so, by producing the appointment. The appeal, therefore, must be sustained with costs, and a new trial ordered. We cannot give the plaintiff judgment in the action, because we do not know what the defence is, or what exactly was the amount due.

WISE, J., concurred.

Judgment for the appellant.

APPENDIX.

OSBORNE and others *against* EALES (a).

February, 1864.

THIS is an appeal from an order of the Supreme Court of the colony of New South Wales, refusing an injunction to stay execution upon a judgment obtained by the respondent against the appellants (b). The appellants are the executors of *Henry Osborne*, and the respondent obtained this judgment against them upon a bond, to be presently stated, given by the said testator to the respondent, under the circumstances we are about to detail.

On the 30th December, 1851, a large tract of land in the colony was granted by the Governor to *Henry Osborne*, the appellants' testator, as the purchaser of the land from one *John Stirling*, who derived his title by purchase from the trustees of the insolvent estate of *John Terry Hughes*. This grant was made to *Osborne* after a contest before the Commissioners of Claims in the colony between him and *Rosetta Terry*, who claimed to have the land granted to her in right of a mortgage to her by *John Terry Hughes*, and under an arrangement made by her with the trustees of his estate, by which she was to take the land in discharge of her mortgage debt. The land having been thus granted to *Henry Osborne*, he agreed to sell it to the respondent for the sum of £2,000; a written agreement of sale and purchase was entered into between these parties, which was as follows:—

“Agreement, made on the tenth day of July, one thousand eight hundred and fifty-two, between *Henry Osborne*, of Marshal Mount, Illawarra, Esquire, of the one part, and *John Eales*, of Hunter River, Esquire, of the other part. The said *Henry Osborne* agrees to sell, and the said *John Eales* to purchase, one thousand and twenty-seven acres and one rood of land, situate in the parish of Alnwick, county of Northumberland, granted by the Crown to the said *Henry Osborne*, by deed dated the thirteenth day of December last, at the price of two thousand pounds, to be paid on the execution of the conveyance. The vendor is either to give the purchaser immediate possession, or to pay any necessary expenses of his obtaining such possession; but any arrears of rent or mesne profits recoverable to this date are to belong to the vendor. *Mrs. Osborne* is to release her dower in the usual manner.”

After the making of this agreement some discussion appears to have taken place between the parties in reference to the position of the respondent in the event of the agreement being carried into effect and

not to interfere with a legal right upon the assertion of a merely doubtful equity. It interferes in such a case, to be satisfied that there is an equity calling for its interference as clear as the legal right which it is called upon to control.

(a) Present Lord *Chelmsford*, Lord Justice *Knight Bruce*, and Lord Justice *Turner*.
(b) Reported 2 Sup. Ct. R., Eq. 37.

A sold to B. for £2000 certain lands to which C. had a claim, and executed a bond in the penalty of £4000, conditioned to be void if he should deliver possession within a year after date, and there should not be at the end of such year any suit against him or B., whereby B.'s title might be prejudicially affected, or if A. should pay to B. £2000 and interest on the day twelve months after date. A suit was instituted by C. but not decided before the end of the year. After the year, A offered to pay the £2000 and interest, and to take a reconveyance of the land, which was refused. B. brought an action on the bond and recovered the full penalty, whereupon A. filed a bill for injunction against proceedings at law, on payment of £2000 and interest from date of bond. Held, affirming the decision of the Court below, that under the circumstances, the injunction ought to be refused. A Court of Equity ought

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Rosetta Terry proceeding to enforce her claim. We defer for the present stating the evidence as to what passed in the course of this discussion. The result of it was, that on the 21st July, 1852, a bond was given by *Henry Osborne* to the respondent, and the respondent signed a memorandum at the foot of the bond. The bond and memorandum were as follows:—

“ Know all men by these presents, that I, *Henry Osborne*, of Illawarra, in the colony of New South Wales, Esquire, am held and firmly bound unto *John Eales*, of Berry Park, in the colony aforesaid, Esquire, or his certain attorney, executors, administrators, and assigns, in the sum of four thousand pounds of lawful British money, to be paid to the said *John Eales*, or his certain attorney, executors, administrators, or assigns, for which payment, to be well and truly made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated this twenty-first day of July, in the year of our Lord one thousand eight hundred and fifty-two: Whereas the said *John Eales* has lately purchased from the said *Henry Osborne* certain lands in the parish of Alnwick, in the said colony, consisting of one thousand and twenty-seven acres and one rood, granted to the said *Henry Osborne* by deed poll, bearing date the thirtieth day of December, one thousand eight hundred and fifty-one. Now the condition of this obligation is this, that if the said *Henry Osborne* shall deliver possession of the said land, or the said *John Eales* shall otherwise obtain possession of the said land within twelve calendar months from this date, and there shall not be, at the end of such time, any suit or other proceeding at law or in equity pending against the said *Henry Osborne*, or any person or persons claiming under him, or against the said *John Eales*, or any person or persons claiming under him, whereby the title to the said land of the said *John Eales*, and those claiming under him, as derived from the said *Henry Osborne*, may be prejudicially affected, or if the said *Henry Osborne*, his executors or administrators, shall, on the twenty-first day of July, one thousand eight hundred and fifty-three, pay to the said *John Eales*, his heirs, executors, administrators, or assigns, the sum of two thousand pounds, with interest for the same from the date of these presents, at six pounds per centum per annum, then, and in either such case, this obligation shall be void, otherwise shall remain in full force and virtue.”

“ Memorandum:—If the sum of two thousand pounds and interest be received by me under the above bond, I undertake to convey all my interest in the land as Mr. *Osborne* shall direct, without any incumbrance occasioned by me.”

Upon this bond being executed and the memorandum signed, the purchase was completed. The estate was conveyed to the respondent. The conveyance and the bond were delivered to him, and he paid the purchase money and got into possession of the estate. Shortly before the purchase was thus completed, a bill was filed by *Rosetta Terry* against *Osborne*, praying either an absolute conveyance of the land or foreclosure upon her alleged mortgage title, and soon after the completion of the purchase, the respondent was made a party defendant to this suit. He defended the suit, but ultimately by a decree dated the 15th of November, 1856, it was declared that the plaintiff, *Rosetta Terry*,

had an equitable mortgage on the land to secure the payment of the sum of £2,000, with interest thereon, at the rate of £10 per cent. per annum, and an account was directed of what was due to *Rosetta Terry* for principal and interest on her mortgage. In pursuance of this decree, the Master made his report on the 6th March, 1858, and thereby found that the sum of £3,116 13s. 4d. would, on the 6th September, 1858, be due to *Rosetta Terry* in respect of her mortgage, and this sum was paid by the respondent to *Rosetta Terry*, in redemption of her mortgage. From the foregoing circumstances it will be seen that the suit instituted by *Rosetta Terry* was pending at the end of twelve calendar months from the date of the bond, being the 21st July, 1853. *Osborne* did not, it appears, on that day pay to the respondent the £2,000 and interest, and demand a reconveyance of the estate as under the bond and memorandum he was entitled to do; but on the 16th August, 1853, he offered to pay to the respondent the £2,000 and interest, and to take a reconveyance of the estate. The respondent, however, then declined to accept the offer. Matters appear to have rested thus until the 27th April, 1858, when *Osborne* instituted a suit against the respondent, which, upon his death, pending the suit, was revived by the appellants, his executors. The bill alleged that subsequently to the purchase agreement of the 10th July, 1852, there was a discussion between the plaintiff and the defendant in reference to the position of the defendant in the event of the agreement being carried into effect, and of *Rosetta Terry's* succeeding in establishing her claim, and that the defendant then insisted that he ought to have the option of rescinding his purchase, and to have security for the return of his purchase money in the event of *Rosetta Terry* so succeeding: that the plaintiff acquiesced in what was so insisted on by the defendant, and that it was accordingly agreed between the plaintiff and the defendant that the plaintiff should enter into a bond for enabling the defendant, if he should elect so to do, to recover from the plaintiff the purchase money of £2,000 with interest thereon, in case the plaintiff should, in consequence of *Rosetta Terry* succeeding in establishing her claim, be unable to carry out the agreement for the sale to the defendant free from the claim of *Rosetta Terry*, and that it was also agreed between the plaintiff and the defendant, that the defendant should, on receiving back his purchase money and interest, reconvey the land to the plaintiff; that there was considerable discussion as to the precise terms of the bond, and especially as to what time should be allowed for the determination of the claim of *Rosetta Terry*, and that the result of the discussion was that the agreement was carried into effect by the bond and memorandum above set forth.

The bill charged that the sole object of the bond was to provide that in the event of *Rosetta Terry* succeeding, as she had done, in establishing her claim, the defendant might have the option of rescinding his purchase, and of recovering the purchase money from the plaintiff with interest, on reconveying the land to the plaintiff, and that the time mentioned in the bond for payment of the £2,000 and interest was inserted only in reference to the probable duration of the suit by *Rosetta Terry*, and was not intended to affect in any way the general object for which the bond was given. The bill, therefore, prayed that the de-

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fendant might be decreed to elect either to retain or give up the purchase of the land, the plaintiff offering in the event of the defendant electing to give up the purchase to pay to the defendant the £2,000 with interest, upon the defendant's conveying to him the land without any incumbrances occasioned by him, the defendant; that the bond might be cancelled, and for an injunction to restrain proceedings at law upon it. The respondent put in his answer to this bill, and by the answer he denied the allegations of the bill as to the discussions which had taken place respecting the bond and the purposes for which it was given; and stated that the agreement was that the bond should be given to protect his title, and to secure him against any claim upon the land which he had purchased. Evidence was gone into on both sides in this suit, and upon the hearing before the Primary Judge in Equity the bill was dismissed with costs. This decision was affirmed by the Supreme Court of the colony upon appeal, and from the decision of the Supreme Court there was an appeal to her Majesty which was heard before this Committee. Their Lordships gave judgment on this Appeal on the 16th July, 1862, and after observing that the bill was founded upon the principle that the respondent was not entitled to hold both the bond and the estate, and that the plaintiffs had a right to put him to his election between the two, and that the question was not raised to what extent the defendant, retaining the estate, was entitled to avail himself of the bond, and further observing that the evidence of the intention of the parties as it was to be collected from the pleadings and the evidence was so vague, and in some respects so contradictory, that it was impossible to arrive at any satisfactory conclusion as to their intention if such evidence could be attended to against the written instrument they proceeded to consider the legal and equitable rights of the parties, and held that the judgment of the colonial Court ought to be affirmed; but after stating their reasons for this conclusion they expressed themselves as follows:—

“To what extent the obligor is liable upon the bond if the purchaser keeps the estate is a question not raised upon the record, and which we cannot decide. At law the bond would be forfeited if the claim was pending on the 21st July, 1853, and were dismissed on the 22nd. But certainly it never could be the intention of the parties that in such case the purchaser should both keep the estate and receive back the purchase money. In that case Equity would probably have granted relief on the terms of the obligor's paying the costs which the obligee had incurred in resisting the claim; so if the claim had been established to an amount less than the purchase money, it could not be intended that, if the purchaser had to pay £100 in respect of the claim, he should recover £2,000 or more from the vendor. The reasonable interpretation of the contract appears to be that the bond should stand as an indemnity to the purchaser against this claim to the extent of the purchase money and interest.”

Pending this appeal, however, the respondent had brought an action on the bond against the appellants, and in this action he obtained a verdict for the sum of £4,000, the full amount of the bond (a). The appellants then filed the bill against the respondent which has given rise

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(a) 2 Sup. Ct. R., C.L. 103.

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to the present appeal. The bill, after reiterating in terms the allegations contained in the former bill as to the discussions which had taken place after the purchase agreement had been entered into in reference to the position of the respondent, in the event of the agreement being carried into effect, and of *Rosetta Terry* proceeding to enforce her claim, and as to what had passed in the course of such discussion, proceeded to charge—

“That by the terms of the contract entered into between *Henry Osborne* and the defendant, the bond given by *Henry Osborne* to the defendant was to stand as an indemnity to the defendant against the claim of *Rosetta Terry*, to the extent of the purchase money, or sum of two thousand pounds and interest, but no further.”

And the bill accordingly prayed—

“That, upon payment by the plaintiffs to the defendant of the sum of two thousand pounds and interest thereon, at the rate of six pounds per centum per annum, from the thirtieth of July, one thousand eight hundred and fifty-two, to the time of the offer to pay the same, together with the costs of the said action, which payment the plaintiffs were ready and willing and thereby offered to make, the defendant might be restrained, by the order and injunction of the Court, from further proceeding in the said action, and from issuing execution for the amount recovered in the said action; and might also be directed to deliver up to the plaintiffs the said bond given by *Henry Osborne* to the defendant.”

Immediately upon the filing of this bill the appellants gave notice of motion for an injunction to stay further proceedings in the action upon payment by them to the defendant of £2,000 and interest from the 13th of July, 1862 (sic), to the 16th August, 1863 (sic), when *Henry Osborne* offered to repay the purchase money and interest, and of the taxed costs of the action at law, which the appellants offered to pay. This motion was supported by an affidavit of the appellants' solicitor verifying in terms the allegations of the bill as to the discussions which had taken place after the date of the purchase agreement in reference to the position of the respondent, in the event of the agreement being carried into effect, and of *Rosetta Terry* afterwards proceeding to enforce her claim, and as to what had passed in the course of such discussions. It was met by an unsworn statement of the respondent which was received by consent, and in which he stated as follows:—

“1. The late *Henry Osborne* first offered the land in the pleadings mentioned to me for sale many months before I agreed to purchase. He came to my house at Berry Park, which is an adjoining property, and asked me to show him Duckinfield (the property in question). I rode with him over it, and showed it to him. He then said something to the effect that I had better buy it. I declined, saying I did not want it. He some time after again offered to sell it to me, and then I said I would give him £2,000 for it, but he wanted more. In a short time after, the said *Henry Osborne* again came to Berry Park. I was sitting at dinner, and went outside to him. He again asked me to buy the property. I said I would give him what I had before offered (£2,000) for it, and no more. He said 'Then it is yours.' I then returned with him to the dinner-table, and said I had bought Duckinfield.

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“2. Shortly after, I went to Sydney; and on the 10th day of July, 1852, a contract was signed by me and the said *Henry Osborne*, at the house of Mr. *Holden* (who was the solicitor of *Henry Osborne*). Myself, the said *Henry Osborne*, Mr. *Holden*, and Mr. *Daintrey* (who was the solicitor of the respondent), were present. Before signing the contract, reference was made to Mrs. *Terry*’s claim, which Mr. *Holden* seemed to think very lightly of. My solicitor, Mr. *Daintrey*, said something to the effect, ‘If you think so little of the claim, you will have no objection to give us an absolute covenant.’ Mr. *Holden* said to the effect that he would not mind doing that even, but it would cast suspicion on the title. It was at that meeting agreed that some security should be given to indemnify me against any claim by Mrs. *Terry*, but it was not until some days after that a bond was finally fixed on as the security.

“3. I looked upon the bond in no other light than as security to indemnify me against Mrs. *Terry*’s claim, and, on my part, there was no understanding that the bond should mean or intend anything not expressed on the face of it, and of the memorandum indorsed.

“4. The memorandum was not indorsed to give the said *Henry Osborne* the power of repurchasing the land at any time, but to enable him to relieve himself from his liability under the bond, if he should elect to tender back the purchase money on the day mentioned in the bond—that is, on the 21st day of July, 1853.

“5. I deny that I ever took upon myself the expenses of defending against Mrs. *Terry*, or the expenses of obtaining possession of the land; on the contrary, by the agreement of the 10th day of July, 1852, in the bill mentioned, the expenses of obtaining possession of the said land are expressly thrown on the said *Henry Osborne*.

“6. There was very little discussion between myself and the said *Henry Osborne* as to the precise terms of the bond, and there was no necessity for much discussion; because, from the day the agreement for sale was signed, it was well understood that security to protect my title against Mrs. *Terry*’s claim should be given. I believe the said *Henry Osborne* cared very little about the terms of the bond, because he was confident that his title, and mine as claiming from him, could not be disturbed.”

It was also met by an affidavit of the respondent’s solicitor, in which he deposed as follows:—

“1. After the purchase agreement was drawn up on the tenth of July, one thousand eight hundred and fifty-two, it was mentioned, that before the purchase money was paid, security should be given to defendant, to protect him, as I understood, against Mrs. *Terry*’s claim.

“2. I heard nothing said at the meeting on the 10th of July, nor subsequently, as to defendant having an option of rescinding the purchase at any time; and I did not understand the bond or the memorandum in any such sense. The meaning of the two together was this, as I understood it—that if, on the twenty-first of July, one thousand eight hundred and fifty-three, the said *Henry Osborne* wished to get rid of his responsibility under the bond, he might do so by tendering back the purchase money on that day, with interest, as in the bond mentioned.

"3. I verily believe that the defendant left Sydney on the night of the twelfth day of July, one thousand eight hundred and fifty-two, and went to the Hunter, and did not return to Sydney, as I believe, until the nineteenth of July. I did not see him myself, as I believe, until the twentieth. On the day following, the twenty-first, I went with him and saw Mr. *Holden*. I think Mr. *Osborne* went with us, but I am not quite positive as to this. At this meeting it was agreed that a bond should be given. I returned to my office immediately and drew up the draft of a bond accordingly, and submitted it to Mr. *Holden*, who altered it slightly.

"4. On the same day, the twenty-first, the conveyance of the land and bond were handed over to me at Mr. *Holden's* office. Mr. *Holden*, the late Mr. *Osborne*, and defendant and myself were present, and I was directed to take immediate proceedings to obtain possession, and I commenced an action of ejectment against the tenants in possession at once. Mrs. *Terry* shortly after made defendant party to a suit already commenced against the late *Henry Osborne*.

"5. From my recollection of what passed at the time the bond was entered into, and from all that has passed between myself and the defendant since, I verily believe that the defendant, from first to last, always considered the bond in the light of a security to his title."

The respondent's solicitor also verified the Judge's notes upon the trial of the action which were as follows:—

Daintrey examined by Sir *William Manning* :—I am solicitor of the defendant *Eales*. The bill filed against *Osborne* first, and after the bond given against *Eales*. Under the order, I paid £3,116 13s. 4d., being the principal and interest on the mortgage. The Sheriff was ordered to be paid by *Osborne* or *Eales* the costs of Mrs. *Terry's* suit, which I paid for *Eales*, amounting to £354 17s. 3d. *Eales* paid me the costs between attorney and client, £538 9s. 7d., and the interest paid on the principal and interest was £63 6s. 8d. The amount altogether is £4,073 6s. 10d. The circumstances under which the bond was given were, that *Osborne* had agreed to sell the land to *Eales*, and, between the contract and the conveyance, I learned that a suit had been commenced against *Osborne*; and it was agreed that security should be given. The bond was drawn, and submitted to Mr. *Holden*, and executed at the same time as the conveyance was executed, I believe. *Cross-examined by Mr. Martin* :—*Eales* was to pay two thousand pounds. It was not stated that if he lost the land he was to get his two thousand pounds and interest. We discussed the claim; Mr. *Holden* made light of it. I said, 'Will you give an absolute covenant for title?' Mr. *Holden* objected, and this was then given. Two thousand pounds was put into the bond. *Osborne* and *Eales* told me to prepare the bond, after the conversation as to the bill. *Eales* has the land. *Re-examined by Sir William Manning* :—Some security was talked of against the suit, and the bond was proposed. I can find no correspondence as to it."

Upon the hearing of this motion before the Primary Judge in Equity, it was refused without costs, and upon appeal this decision was affirmed by the Supreme Court (a). It is from this order of the Supreme Court, affirming the decision of the Primary Judge, the present appeal has been brought.

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In disposing of this appeal, we must of course have regard to what has been already decided in the course of the litigation with reference to the bond, the subject of the appeal, and we consider it to have been finally settled by the decision upon the former appeal to which we have referred, that the respondent was entitled to hold both the purchased estate and the bond. Being then thus entitled to hold the bond, the respondent must of course be entitled to enforce it, and the sole question, therefore, which we have now to consider is, for what purpose and to what extent he is in equity so entitled. That this bond is not to be considered as a bond for the absolute payment of the sum of £4,000 without reference to any other consideration, we entertain no doubt. The reasons assigned in the judgment upon the former appeal are, in our opinion, conclusive upon that point (a). For the reasons there assigned it seems to us to be clear that the bond must be considered to be a bond of indemnity merely, and the real question, therefore, which we have now to decide is, what is the extent of the indemnity which the bond was intended to secure; whether, as the appellants contend, it was intended for the security of the respondent to the extent of the purchase money and interest only; or, as the respondent contends, it was meant for his security to the full extent of the £4,000 made payable by it. From the judgment delivered upon the former appeal, which, however, was extra-judicial, the point not having been before the Court, it is evident that the opinion of the Court was favourable to the view taken by the appellants; and on the other hand it is not less evident from the judgments delivered by the Judges of the colonial Court that their opinion is favourable to the respondent's view. The case, therefore, cannot be considered otherwise than as one of considerable difficulty. We are bound, however, to act upon our own opinion, much as we must of necessity respect the opinion expressed by this Court upon the former appeal, although that opinion was extra-judicial; and we think it right to express our full concurrence in the opinion of the colonial Judges that they also were bound to act upon the opinions which they entertained. The bond is forfeited at law, and at law the full sum of £4,000 is payable upon it. There is no case alleged upon the bill for the interference of a Court of Equity, except upon the footing of agreement. There is no fraud, no mistake, no accident alleged. The case rests wholly upon the alleged agreement, and the question therefore seems to be whether the appellants have proved this alleged agreement. We are satisfied that upon the evidence before us they have failed to do so. No doubt there are circumstances which would render it probable that the agreement alleged was the agreement which was likely to have been come to between the parties. The fact of the bond having been taken in the sum of £4,000, which is exactly double the amount of the purchase money, and of the heavy liability imposed upon the vendor, the testator of the appellants, by the bond having been taken in so large a sum, would tend to that conclusion; but these are circumstances which show merely what the agreement might probably have been, not what in fact it was, and on the other hand it is to be considered that it was plainly intended that the respondent should become the owner of the estate in the event of the option to re-purchase provided for by the bond not being exercised.

(a) 2 Sup. Ct. R., Appendix 22.

and that in the event of the respondent thus becoming the owner of the estate, he could neither improve it nor in any way deal with it, except at his own peril, if in the event of his title being disturbed he was to recover only his purchase money and interest. It is to be considered too that if the agreement had been such as is alleged on the part of the appellants, it might easily have been so expressed in the bond, and that it is not so expressed. There are circumstances which render it difficult to suppose that the respondent, in the event of his title being disturbed, was to recover back only his purchase money and interest. Weighing these considerations on the one side and on the other we find ourselves unable to arrive at any certain conclusion that the liability upon this bond was intended to be limited to the purchase money and interest, and in the absence of such a conclusion we think that a Court of Equity could not be justified in interfering with the legal liability upon the bond. A Court of Equity ought not, as we think, to interfere with a legal right upon the assertion of a merely doubtful equity. It ought, we think, before it interferes in such a case, to be satisfied that there is an equity calling for its interference as clear as the legal right which it is called upon to control.

It was argued for the appellants that the respondent was not bound to pay the mortgage, and that he was not entitled to alter the appellants' liability by making the payment, but having regard to the purchase agreement it was the appellants' duty to pay the mortgage ; and if, as we think was the case, the respondent was, as between him and the testator of the appellants, to become the owner of the estate after the period limited for the re-purchase he was, in our opinion, entitled to pay the mortgage, although he was not bound to do so. Again, it was argued for the appellants that it could not be intended that the testator should not only lose the estate and the purchase money, but be liable also to pay the mortgage, so far as it might exceed the purchase money ; but in addition to what has been already said as to the vendor's liability to pay the mortgage, it is to be observed that the vendor, the testator of the appellants, entered into this bond with full knowledge of the nature, if not of the extent, of the claim against the estate, and that with that knowledge he thought it for his interest to give the bond rather than lose the opportunity of selling the estate. It appears indeed from the evidence that he thought but lightly of the claim. He cannot, we think, be entitled to visit upon the respondent the erroneous opinion which he may have formed of the validity or amount of the claim. That the respondent also knew of the claim does not seem to us to alter the case, as he took an indemnity against it. It was further argued for the appellants that the respondent was not entitled to recover the costs paid by him to *Rosetta Terry*, or the costs incurred by him in defending her suit, and authorities were referred to as to damages in cases of eviction ; but on looking into these authorities they do not appear to us to support the appellants' contention. On the contrary, in most if not all of the cases, the costs of defending the title seem to have been allowed. We do not think it necessary, however, to enter into a minute examination of the authorities on this subject, for we do not think that this case can be governed by the cases on eviction. The intention of the parties appears to us to have been that

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the respondent should be fully indemnified to the extent of the liability upon the bond, and as he was to continue to be the owner of the estate we think that he was well entitled to defend the proceedings instituted by *Rosetta Terry*, more especially as those proceedings extended to the recovery of the estate itself, and not of the mortgage money only. We are of opinion, therefore, that the respondent was entitled to be allowed the costs incurred in defending *Rosetta Terry's* suit, and as these costs, together with the principal and interest paid upon the mortgage, exceed the £4,000 made payable by the bond, we think that the motion for the injunction in this case was properly refused. We shall, therefore, humbly recommend her Majesty to dismiss this appeal; but having regard to what was said upon the hearing of the former appeal and to the difficulty of the case, we shall recommend that the appeal be dismissed without costs.

5 February, 1863.

MORRIS, assignee, &c. against FLOWER and others.

To an action by the official assignee of the insolvent firm of F. and K., under 5 Vic., No. 17, s. 8, to recover from the defendants sundry promissory notes, bills of exchange, and bankers' cheques, or their value; the same having been delivered to them by F. and K. when actually insolvent, and within sixty days preceding the sequestration of their estate—and such delivery having the effect of preferring the defendants, as creditors of the said insolvents, to others of their then creditors, the defendants pleaded that the delivery of the several instruments was a payment to them, *bond fide* made, and before any order for the sequestration was known, either to them or the insolvents.

THE following are the reasons for the judgment in this case—now under appeal to her Majesty in Council.

STEPHEN, C. J. This was an action by the official assignee of the insolvent firm of *Furlong and Kennedy*, under section 8 of the Act 5 Vic., No. 17, to recover from the defendants sundry promissory notes, bills of exchange, and bankers' cheques, or their value; the same having been delivered to them by *Furlong and Company*, when actually insolvent, and within sixty days preceding the sequestration of their estate—and such delivery having the effect, in the language of that section, of preferring the defendants as creditors of the said insolvents, to others of their then creditors. The defendants pleaded, among other pleas, that the delivery of the several instruments was a "payment" to them, *bond fide* made, and before any order for the sequestration was known, either to them or the insolvents. To this the plaintiff demurred, on grounds which will be stated presently. We gave judgment thereupon in his favour, and from that decision the defendants have appealed.

The eighth section, on which as we conceive the question wholly turns, is in the following words:—"All alienations, transfers, gifts, surrenders, deliveries, mortgages, or pledges, of any estate, goods, or effects, real or personal, warrants of attorney, *cognovit actionem*, and judgments thereon, made by any person being insolvent, or in contemplation of surrendering his estate as insolvent,—or knowing that legal

payment to them, *bond fide* made, and before any order for the sequestration was known either to them or the insolvents. *Held*, on demurrer, that the plea was bad.

The transfer or delivery of property of any kind, not being money, or that which ordinarily passes current as money among persons in business—although, as between the parties, the delivery and acceptance may amount to payment—is not a payment within the meaning of the 12th section of the Insolvent Act.

The words in the protecting or later portion of the 12th section apply exclusively to payments made after sequestration.

Quære (per Wise, J.), whether under any circumstances payments can be included within the terms of the 8th section.

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proceedings for obtaining an order for the sequestration of his estate as insolvent have been commenced,—or within sixty days preceding the making of any order for the sequestration of his estate as insolvent,—and having the effect of preferring any then existing creditor to another—shall be and are hereby declared to be absolutely void."

Now the debtors in this case, Messrs. *Furlong* and *Kennedy*, were insolvent (as it is admitted on the record) at the time of the transfer in question; and, moreover, that transfer was made within sixty days next before the sequestration of their estate as insolvent. The defendants, it is also admitted, were creditors of those persons at the time of the transfer; and there existed at the same time other creditors, whom—as the demurrer further admits—that transfer had the effect of postponing. In other words, it preferred the defendants in effect to those other creditors, within the clear intent and terms of the enactment. The transaction, therefore, under the eighth section, was absolutely void.

But, say the defendants, the transaction was a payment, and it was really and *bond fide* made. We may concede that, in one sense, to the extent covered by it (the instruments being taken at their nominal, or at some agreed amount), the transfer in question was a payment. Such, practically, must be the transfer of any property to a creditor, made in liquidation or reduction of his debt. The object of the clause was, however, it is obvious, to prevent all such transactions between an embarrassed debtor and his creditors—because, by no other means could preferences, generally fraudulent, be effectually restrained. The *bond fides* of the transfer, and whether by way of payment or not, therefore, does not affect the case. Debtors in a state of insolvency, or on the eve of sequestration, are not permitted, by thus making over property, to afford one or more of their creditors, whether pressing or not, an advantage over the rest. Every such transfer or delivery of property, which has the "effect" of preferring one to any other existing creditor, is declared void.

The defendants further say, however, that the transfer or payment was made before any order for sequestering this estate was "known" to them. Such an allegation would be intelligible, had the transaction been posterior to sequestration—so that they could have known of such an order. But the action is founded on an alienation, which confessedly preceded that event. No sequestration order therefore having at the time existed, knowledge of it was impossible. The plea, nevertheless, is as stated—that the delivery or transfer was a payment, made really and *bond fide*, before either of the parties had any knowledge of the sequestration. In other words, the transaction having occurred before the sequestration order existed, they were each ignorant that any did exist.

The plaintiffs accordingly object that the plea ought to have alleged the existence of such an order, in fact, at the time of the payment, although then unknown to the parties. Secondly, that assuming the non-existence of any such order, the plea ought to have shown that the payment, as such, was not under the Act "fraudulent" and void. Lastly, that the plea is inconsistent, in relying on the transaction as

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a payment, while at the same time admitting it to be a transfer and alienation of property.

The plea, obviously, is framed on the 12th section of the statute; and the substantial question raised by it is, whether—taking this transfer to have been in fact, as in effect it was, a payment—that enactment protects the transaction.

The section is as follows:—“All payments made to any creditor, by any person not compelled by legal process to make the same, and knowing himself to be insolvent—or in contemplation of surrendering his estate as insolvent—or knowing that legal proceedings for obtaining an order for sequestration of his estate as insolvent have been commenced, or that any such order has been made—shall be and are hereby declared to be fraudulent; but all payments really and *bond fide* made by any insolvent, or by any person on his behalf, to any creditor, before any order made for the sequestration of his estate is known to the insolvent, or to such creditor, shall be valid.” The position sought to be maintained for the defendants was, not that the transfer of property by an insolvent debtor, made in liquidation of a debt, was taken out of the eighth clause—but that it was valid, as a payment “really and *bond fide* made” by him, if, only, no order for the sequestration of his estate was, at the time of the transfer, “known” to the party paid or paying. And we refused to allow that point to be argued, because it had been more than once determined in this Court—particularly in the then recent case of *Sempill v. Anderson* (a).

We in fact felt no difficulty in adhering to our former decisions; as we thought it clear, for the reasons given in our judgment on the last occasion, that the words relied on for the defendants—being those in the protecting or later portion of the clause—applied exclusively to payments made after sequestration. To those reasons consequently we would refer, in connexion with our judgment in the present case.

The transaction, however, out of which the point arose in *Sempill v. Anderson* (so far as it respected this 12th section), was one strictly of payment—in money; and not, as here, by the transfer of goods merely. So that, on that occasion, the effect of the 12th section in connexion with the 8th, or upon cases within the latter clause, was not in question. If the 12th so far repeals the 8th section, as to make all transfers of property payments, within the meaning of the former, whenever in fact the property is delivered by way of payment—the plaintiff in this case would appear to have no cause of action. For payments to a creditor, as distinguished from transfers of property to him, are not void, although made by way of preference, merely because (as in cases under the 8th section) the debtor was at the time insolvent. He must know himself to be insolvent, or contemplate sequestration, or know that proceedings are perfected, or have been commenced for such sequestration. On the construction assumed, therefore, the plea would have been a sufficient answer to the declaration, if it had simply averred that the transfer was a payment—without more.

But, in addition to the fact that this was not the point raised here, or proposed to be argued for the defendants, it appears to me that the 12th section cannot be so construed. A payment may, no doubt, be

(a) 30 September, 1860.

effected by the delivery and acceptance of goods. For this, *Cannan v. Wood* (a) is a sufficient authority. But the transfer or delivery of property of any kind, not being money, or that which ordinarily passes current as money among persons in business, is not in common parlance a payment; although, as between the parties, the delivery and acceptance may amount to payment. It is not a transaction of payment, in the ordinary course of business. Such a mode of liquidating a debt must indicate, with sufficient distinctness, to any creditor thus dealt with, that his debtor is embarrassed, and, probably, insolvent; that, at all events he cannot pay his debts as solvent men usually do, but is (either spontaneously or on pressure) preferring in effect some or one, to the injury of his other creditors. A transaction of that kind, therefore, is in my opinion not a payment within the meaning of the 12th section. But, at all events, where the debtor really is insolvent, or on the eve of declared insolvency, it is, I think, embraced exclusively by the 8th, and not touched by the later section.

MILFORD. J. The transaction, as stated in the declaration, is a transfer and delivery of goods; and the 12th section does not apply to such transfers or deliveries, but to something else—namely, payments.

It never could have been contemplated that the same transaction might be treated either as a transfer or a payment, at the option of the creditor receiving the goods in payment. The demurrer must therefore be sustained.

I think that payment cannot be pleaded, under any circumstances, where there was a delivery and transfer of chattels, within the 8th section. If the declaration had stated a payment, then a plea relating to payment might have had some effect; but not when, as here, the declaration states a transfer and delivery.

WISE, J. I also was of opinion that our judgment should be for the plaintiff on the demurrer.

Assuming the facts stated in the first and second counts to be true (which the demurrer admits), the transactions therein referred to are void under the eighth section. Unless, therefore, the plea brings the case within any exception established by the statute itself, it is bad. The twelfth is the only clause which makes any exception as to payments; and the plea attempts to set up, as a defence under that section, that the transactions complained of were really and *bond fide* made by the insolvents, before any order for the sequestration of their estate was known, either to them or the defendants.

But the portion of the 12th section thus relied on, is not an exception upon the 8th section. It is only an exception upon the enactment in the preceding part of the same section; and this Court has repeatedly decided that it only relates to payments made after an order obtained for a compulsory sequestration. The plea does not allege that any such order had been made, nor could it do so, as it is pleaded to both counts; one of which specifically states that the transaction took place “within 60 days preceding the order of sequestration.” The plea therefore confesses, but does not avoid the causes of action stated in the decla-

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ration. In this view of the case, it is not necessary to decide whether, under any circumstances, payments can be included within the terms of the 8th section. See *Cannan v. Wood*. I abstain, therefore, from giving an opinion upon this point.

March 4, 1863.

A promise in writing signed to pay any one unnamed, who shall furnish goods to the writer, or to a third person making default, will become a binding contract with any one who shall accept the promise in writing and furnish the goods.

The provisions of the 17th section of the Statute of Frauds are not satisfied unless the existence of a bargain or contract appears evidenced in writing, and a bargain or contract cannot so appear unless the parties to it are specified either nominally or by description or reference.

The purchaser of a chattel of a greater value than £10, delivered to the seller by way of guarantee for the payment, a memorandum in writing in these words:—"I will furnish H. with funds for the purchase of a steam-engine and machinery for a flour mill

on his suiting himself with the same, and notifying the purchase to me." This memorandum was signed by J., but was not addressed to any one. Held, in an action against J. to recover the price of the flour mill, that this memorandum was not sufficient to satisfy the provisions of the 17th section of the Statute of Frauds, as incorporated in the 9 G. IV., c. 14, s. 7.

Held also, that on a proper construction of the instrument J. contracted not to pay for the flour mill, but to furnish H. with the funds to enable him to pay; and that although the seller had not been paid by him, there would have been a good defence to an action properly framed, if it could have been shown that J. furnished H. with funds.

The liability of a party who advertises generally a reward for information to any one not named in the advertisement, who shall first give the information asked for, is a liability at common law.

In reversing the judgment of the Court below, liberty was given to amend the pleadings, and a new trial directed; the costs of the amendment of the pleadings directed to abide the event of the new trial.

an instrument in writing, signed by him, which it then sets out in terms as above stated ; that *Hardy* gave them the instrument, and they therefore, and only on the basis thereof, agreed with *Hardy* to obtain for him from England a steam-engine, and pay all necessary expenses for the same, all which premises were then notified to *Jobbins*. The count then alleged the performance of this agreement on their part, and the expenditure of £3,000 in such performance, with the performance also of all conditions precedent, and that all things had happened which would entitle them to be paid the money so expended, concluding with a denial that *Hardy*, or *Jobbins*, or the appellants had paid the same.

There was no plea of *non assumpit* to this count, but there was a plea framed on the 17th section of the Statute of Frauds, upon which issue was joined. At the trial, the question of law which this pleading raised was reserved, and the jury found for the respondents on the fact, and gave damages for the full value of the engine with all expenses, taken at the time of its arrival in the colony £2,953 10s. 6d. Upon the argument before the Court, consisting of two Judges only, it was equally divided ; the verdict therefore stood, and judgment has been entered up accordingly.

In the argument before their Lordships, the objection upon the Statute of Frauds has been again relied on, and they are of opinion that it must prevail. The 17th section of the statute (now incorporated into the 7th section of the 9 Geo. IV., cap. 14) requires that "some note or memorandum of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." In the present case the name of the person with whom the contract was to be made does not appear in the instrument, nor on any other paper connected with it, and capable of being considered as completing with it a note or memorandum of the transaction. Whether this instrument is to be considered as evidence of the contract, or only of a proposal which would become a contract upon the acceptance of it by the *Byrnes*, the question is still the same, whether without the insertion of their names in it, or in some other paper connected with it, there is a sufficient note or memorandum in writing of the bargain to satisfy the statute ? Apart from authority, and looking only to the words of the enactment, and the mischiefs which it was intended to prevent, their Lordships think the question must be answered in the negative. The words require a written note of a bargain or contract ; the statute clearly making no distinction between these two words. This language cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing, and a bargain or contract cannot so appear unless the parties to it are specified, either nominally or by description or reference. It is true that the statute does not require the whole bargain in all its terms to be stated ; it stipulates only for a note or memorandum of it, signed by the party to be charged ; but it does in effect require that the essentials, i.e., all those things without which it can be no bargain at all, shall be. Upon this principle it was that the Courts determined, under the 4th section, that the consideration of an agreement must appear on the face of the memorandum of a guarantee, or be matter of

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necessary implication from its language. It was obviously the intent of the statute to prevent, as far as it could conveniently, the mischief of being obliged to have recourse to oral evidence in regard to the transactions within it. But it would fail to accomplish its object in a most material particular, and in one in which its requirement might always be most easily satisfied, if it did not impose the necessity of stating the name of the seller as well as of the buyer; of the party by whom goods were to be supplied, as well as of him to whom they were to be supplied, under the 17th section, or of the party to be guaranteed as well as of him who is to guarantee, under the 4th. Unless this be done, oral evidence must be had recourse to, and the risk incurred that a party may be sued by one with whom he had never intended to have any transaction, a matter of the greatest importance under many supposable circumstances.

Much of the difficulty which has been felt in this and similar cases, arises from not carefully bearing in mind the distinction between the necessary elements of a simple contract at common law, especially where it becomes complete, not at once, but by successive steps, and the requisites to make it a ground of action, which the statute imposes.

Their Lordships do not here enter into a consideration of the authorities which were cited, because they do not understand this general reasoning to be disputed; but only that its applicability to a case like the present is denied. It is said that when this memorandum was made, it was not known whether the Messrs. *Byrnes* would come to any agreement at all; that it must often happen that proposals of this kind are intended to be submitted to a variety of persons in succession; that it can never be necessary to state more than is known at the time when the note is made, and that to require more is in effect to forbid the making of any such contracts at all. Their Lordships do not rely in answering this argument upon the fact in the present case, that the count alleges that the paper was given to *Hardy*, specifically to be given to the *Byrnes*, and that as it contained, therefore, a proposal specifically to them, nothing would have been easier than to have addressed it in terms to them, as would certainly have been done if it had assumed the form of a letter. But it seems to their Lordships that the argument rests on the fallacy of supposing that the statute, as they construe it, could only be satisfied by the name of the *Byrnes* having been written on the paper simultaneously with the rest of the particulars, and on the same paper. The contrary of this, however, has been well established, and it is well known that a large proportion of many transactions, unquestionably within the statute, are of a kind which grow into bargains and agreements in the course of a correspondence or an oral negotiation more or less prolonged. It is surely a valid objection to this argument of the respondents, that it would tend to exclude all such from the operation of the statute. Their Lordships do not doubt that a promise in writing signed to pay anyone unnamed, who shall furnish goods to the writer, or to a third person making default, will become a binding contract with any one, whosoever he may be, who shall accept the promise in writing and furnish the goods. But in such case the requisition of the statute will have been complied with. It was also urged that the present case was within the

principle of the decisions which have established the liability of any one who advertises generally a reward for information to any person not named in the advertisement, who shall first give the information asked for. Their Lordships do not question the authority of those cases, but the answer is obvious; they are cases at common law, and there is nothing to prevent the whole transaction from being proved by oral evidence; it is a mere circumstance that the advertisement is in writing; and no case, they believe, has ever been decided, where by the terms of the offer the information was not to be given within a year, or where it assumed the character of a guarantee. Such a case might have borne more closely on the present.

Their Lordships, therefore, do not agree with the Chief Justice in the distinction which he labours, in his very able judgment, to establish between the present case, and that of *Williams v. Lake* (a). They think that case, although upon the 4th section, a direct authority in the present, and it was not disputed by the learned Chief Justice, or the counsel here, but that it was well decided. It is certainly in conformity with many previous decisions, which they think it unnecessary now to introduce into this judgment. They refer, however, specially to the judgment of Mr. Justice *Blackburn*, in which he illustrates strikingly from the facts before him the mischiefs of a contrary decision.

Their Lordships are of opinion, therefore, on this ground that the judgment of the Court below cannot be sustained. It is proper, however, to observe that, in two other respects it appears to them that there has been a miscarriage in the Court below. In the first place, assuming that the memorandum has been properly construed, and that this was, in truth, a transaction between the respondents and *Jobbins* for the sale or supply of a steam-engine to him by them, it is clear that the engine has never been delivered or accepted. The respondents still retain their property in it, and have only a right to recover the damages sustained by the refusal to accept. But the jury have been instructed, as if in an action for goods sold and delivered, to give the whole value of the engine. In the second place, their Lordships are clearly of opinion, and they collect that it was so considered by the counsel for the respondents, that the instrument has not received its proper construction, and the action, in consequence, has been misconceived. They think that *Jobbins* contracted not to pay for the engine, but to furnish *Hardy* with the funds to enable him to pay; and that, although the *Byrnes* had never been paid by him, there would have been a good defence to the action properly framed, if it could have been shown that *Jobbins* had furnished him with the funds. As there was no plea of *non assumpit* to this count, it might not, perhaps, have been open to the appellants to avail themselves of this error on the present record.

Their Lordships observe that at the close of the trial, it was arranged that, if necessary, the pleadings might be amended, to raise the point in question; it may be questionable whether this arrangement would, in strictness, extend to an amendment at the present stage of the cause, or to any amendment so large as would be necessary to obviate these objections. This, however, does not limit the discretion of their Lord-

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ships, and they think that in advancement of the justice of the case, it will be their duty humbly to recommend to her Majesty that the judgment of the Court below be set aside; that the parties shall be at liberty, on both sides, to amend their pleadings, and proceed to a new trial; that the appellants shall have their costs of the proceedings in the Court below, and of this appeal; and that the costs of the amendment should abide the event of the new trial. It would have been in course to have given the appellants these costs also, but their Lordships do not find that the objections mentioned above were taken in the Court below.

July 23, 1864.

DEAN and another *against* BYRNES and others (a).

D., by his bill, stated that, on the 13th December, 1859, he had advanced to S. £3,000, to be secured on sugars to come to S. from Mauritius and Batavia, and in the months of January and February, 1860, sums to the amount of £7,999 15s. 3d., to be secured on sugars from Batavia alone; that the bills of D. J. & Co. were taken as collateral security and subsequently realised, and the £3,000, together with part of the £7,999 15s. 3d., paid off. The bill claimed the residue. It appeared that on the 14th December, 1859, S. sent the £3,000 to Mauritius, and on the 24th of December bills of his own to the amount of £5,000, per Monarch to Batavia, to buy sugar. In April, 1860, S. assigned his estate to trustees for

his creditors, and in his schedule mentioned the "adventure per Monarch." In August, S.'s agents in Batavia wrote that they had waited to hear from the trustees as to the disposal of the money. The trustees received the bills of lading, and allowed D. to sell under an agreement without prejudice to his claim. *Held*, that under the circumstances D. had no lien on the sugars from Batavia, and that as he had admitted payment out of the £3,000, he had no claim on those from Mauritius.

The plaintiffs claim limited by the statements in the bill.

(a) Present—Lord Kingsdown, the Master of the Rolls, and Sir John Taylor Coleridge.

(b) 1 Sup. Ct. R., C. in Eq. 93.

The sugars from the Mauritius had all arrived at Sydeney, previously to the month of September, 1860, and the sums actually realized by sales previously to that time, and paid to the trustees, amounted to about £14,000, a sum much more than sufficient to cover the whole demand of the appellant, with interest; besides which, there were sugars by the "Yarra" not sold till the month of January, 1861, to the amount of £3,000 and upwards.

According to the appellant's present contention, he was entitled to a lien on these funds for the whole amount of his advances (£10,999 15s. 3d.), made under one agreement and on one security.

But what took place in September, 1860, seems quite inconsistent with any such agreement. He then, by arrangement with *Jones* and the trustees, received on *Jones'* bills £6,083 1s. 2d., and this sum he applied, as even by the amended bill he alleges, in discharge "of the £3,000 and interest, and also in reduction of the £7,999 15s. 3d."

Surely this is a strong confirmation of the fact that the advances were considered by the plaintiff as distinct advances on distinct securities. After the receipt of the amount of these bills, there remained due to the plaintiff the sum of £4,916 14s. 1d., with interest. In the month of January, 1861, the Java sugars by the "Monarch," and a portion of those by the "Visser," were sold.

The proceeds of the sugars by the "Monarch" amounted only to £4,883 0s. 2d., and were therefore insufficient to satisfy the sum due to the plaintiff. The proceeds of that portion of the sugar by the "Visser," which was sold in January, 1861, amounted to £1,552 18s. 2d., and the two sums together would have been sufficient to satisfy the plaintiff's demand.

These sales were made, and the proceeds were received by the plaintiff as broker on the 30th January, 1861. He was called upon by the trustees to pay over to them these sums.

The memorandum of the agreement signed by *Sayers* in March or April, 1860, relied on by the respondent, in speaking of sugars from Batavia, mentioned only sugars by the "Monarch." But the plaintiff contended that he was entitled to a lien on the sugars by the "Visser" as well as on those by the "Monarch." This claim was disputed by the trustees; and on the 7th of March, 1861, the plaintiff filed his original bill, stating two distinct agreements—one for the advance of £3,000, on the security of the Mauritius sugars, and one for the advance of £7,999 15s. 3d. on the Batavian sugars.

The bill stated that the £3,000 advanced on the credit of the Mauritius sugars had been paid to the plaintiff out of the proceeds of those sugars. It then stated that sugars from Batavia had arrived by the "Visser" and the "Monarch," and had been placed in his hands for sale without prejudice to the rights of the parties; that he had a lien on the proceeds of both the said cargoes of sugar for the amounts due to him, but that the trustees threatened to sue him at law for the recovery of these proceeds; and it prayed a declaration that he had a lien on both the said cargoes, and an injunction to restrain proceedings at law by the trustees. It is clear, therefore, that at this time he did not set up any claim on the Mauritius sugars, though it was doubtful

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whether the Batavian sugars included in his security would be sufficient to satisfy the full amount of his debt.

That this bill related only to the Batavian sugars is beyond controversy. It is perfectly clear from the bill, from the affidavits both of the plaintiff and of *Sayers*, and from the proceedings on the motion for injunction. When an application was made for an injunction, it was ordered to stand over, with liberty to both parties to file fresh affidavits as to the proceeds of the cargo by the "Monarch," and, finally, by the order made on the 23rd of April, 1861, the injunction was confined to the sugars by the "Monarch."

The defendants put in their answer to this bill. The trustees of *Sayers* severed in their answer. *Cook* and *Irving* insisted, that though the cargo by the "Monarch" was placed in the hands of *Sayers* for sale, without prejudice to any question between the parties, the cargo by the "Visser" was not made subject to any such conditions; and *Cook* alleged that at that time the plaintiff set up no claim to any part of the cargo by the "Visser."

More than six months after the filing of the original bill, the plaintiff amended it. At this time the matter had been the subject of discussion in Court, the plaintiff must have been fully alive to his rights, and he now had the opportunity of correcting any mistake which had been made in the statement of his case in his original bill.

The amendments were directed to three points. First, he struck out the statement contained in the original bill, that there were two several agreements between him and *Sayers*, and alleged only one agreement, but he left the statement of the contract in other respects as it stood in the original bill. The effect being this, that *Sayers* being about to speculate in sugars to be imported from the Mauritius and Batavia, he (the plaintiff) had engaged to make advances on the security of the sugars, and had first advanced £3,000 on the faith of that agreement, and afterwards advanced £7,999 15s. 3d. on the security of the Batavian sugars.

The second amendment was directed to this point. The original bill had stated that the £3,000 had been paid out of the proceeds of the Mauritius sugars. The amended bill stated, as the fact was, that the payment had been made by means of *Jones*' bill; thirdly, in support of the plaintiff's claims on the sugars by the "Visser," which was one of the main points in dispute, a charge was introduced that the sugars which arrived on board the "Visser" were in fact only the cargo of the "Monarch," and that the "Visser" and the "Monarch" respectively brought no cargoes except the cargo of the "Monarch."

The prayer of the bill remained unchanged, and although by altering the antecedent words to which the prayer relates its meaning might have been altered; in fact no such alteration was made, and the amended like the original bill sought relief only against the Batavian sugar.

That this is the true meaning of the prayer of the amended bill is stated distinctly in the third paragraph of the plaintiff's petition of appeal against the decree of the Primary Judge:—

"The cargoes of sugar mentioned in the prayer of the said bill, are

certain sugars which arrived in Sydney from Batavia at the time and under the circumstances in the said bill stated."

Now this is not a case in which the plaintiff can have been mistaken as to the rights for which he had contracted. It is not the case of a written instrument which he may have misconstrued. The agreement was verbal between himself and *Sayers*; and if he supposed that he had any right against the Mauritius sugars, it is inconceivable that instead of asserting it he should have persisted for months, and as far as appears up to the hearing, in urging doubtful claims against the Batavian sugars, admitting, if not in terms stating, that all his claims on the Mauritius sugars had been satisfied. That this was the actual agreement is rendered at least not improbable by the fact that the £3,000 were on the same day on which the money was advanced, remitted to the Mauritius to purchase sugar, but no part of the other sum was so employed.

The document so much relied on by the plaintiff, as containing the terms of the original agreement, is really of no value. It seems that a memorandum of those terms, whatever they really were, was made at the time. That memorandum was in the plaintiff's possession. It is not produced, and he says that he has lost it. The memorandum contained in the letter signed by *Sayers* was not written by him; it was signed after he had become insolvent; it clearly does not contain the original agreement as now represented by the plaintiff and nothing more, for it refers to bills of exchange to the amount of £10,823 5s. 5d. deposited as a collateral security with the plaintiff, which formed no part of the original agreement between the plaintiff and *Sayers*, and it refers to sugars exported from Batavia by the "Monarch," and not by any other ship.

It seems to us that to give effect to what is now contended to have been the real agreement between the parties, would be to contradict not only the statement of the plaintiff in his record, but that which, up to the hearing, he has always shown by his acts as well as his allegations that he considered to be the real agreement with *Sayers*. It would be to bind the defendants by the terms of a parol agreement which has never been alleged, and which they have never had an opportunity of disproving.

Upon this point, therefore, we think that the Courts below were right.

There remains the question whether upon the facts appearing in evidence the plaintiff has established a right to a lien on the sugars from Batavia, or any part of them.

The facts, as far as we can collect them from the evidence, appear to be these:—

It was no part of the contract between the plaintiff and *Sayers* that the monies advanced by him should be invested in the purchase of any particular sugars, or of any sugars at all. It was a personal loan by a broker to a merchant, who represented that he was speculating in the purchase of sugar, and the loan was procured by the engagement that the merchant would place in the hands of the broker for sale the sugars which he was expecting from two quarters, the Mauritius and Batavia, and that the broker should derive the profits of commission arising

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from the sale, and should repay his advances with interest out of the proceeds. The plaintiff could not insist upon the investment of the monies which he advanced in any particular mode, nor insist upon the purchase by *Sayers* of any sugars in the Mauritius, Batavia, or elsewhere. If *Sayers* purchased no sugar, the plaintiff had no remedy except by an action to recover his debt. In fact, no part whatever of his advances was invested in the purchase of the Batavian sugar. The £3,000 which he first advanced were remitted, as we have observed, to Mauritius, and the remaining monies were not advanced by him till the months of January and February, 1860.

But the funds with which the Batavian sugars were purchased, as well those by the "Visser" as those by the "Monarch," had been remitted by *Sayers* to Messrs. *Hunter* and *Co.*, his agents in Batavia, between the 17th and 20th of December, 1859, and orders had been given by him to his agents at that time to invest them in the purchase of sugars. Those orders, with the funds themselves, were sent by the "Monarch," in which ship it was intended that the sugars to be purchased should be sent home.

The funds and the orders were received by *Hunter* and *Co.*, in Batavia, and the receipt was acknowledged by them in a letter dated the 12th of February, 1860. In this letter they stated the impossibility of executing the order for the purchase of sugars, and suggested various other modes of employing the funds.

On the 15th of February they wrote again to say that they were unable to procure any sugar, adding, "We fear, therefore, there is no other remedy but to find the ship employment till the sugar season comes round."

On the 23rd of April, 1860, they wrote again to say they were unable to procure any of the sugar required, though they were sending samples round amongst the planters, and hoped to succeed before the grinding began at the works.

At this time they had in their hands the monies which had been remitted to them by *Sayers*. But these monies had before this time ceased to be his property, and had passed to his trustees under the deed of the preceding 16th of April.

On the 3rd of May, having met unexpectedly with an opportunity of purchasing a lot of sugar, *Hunter* and *Co.* bought it for *Sayers*, and consigned it to him by the ship "Visser," and advised him of what they had done by a letter of that date.

The "Visser" seems to have arrived at Sydney in June or July, 1860, and the cargo was claimed on behalf of *Sayers*' trustees on the one hand, and by the plaintiff on the other; and on the 20th August, 1860, this cargo, as well as that by the "Yarra," was placed in the hands of *Sayers* for sale, and he signed a letter of that date by which he agreed to dispose of the same by auction, and to pay over to the trustees the proceeds thereof, and act generally under their directions in the matter.

We cannot make out from the evidence what was the sum produced by the first sale of the sugars by the "Visser." The portion sold in January, 1861, with respect to which an injunction was praycd, seems to have amounted, as we have stated, to £1,552 odd.

We will assume that on the arrival of these sugars in Sydney nothing was done to affect the right of the plaintiff, and that his claim stands upon the same ground as his right against the cargo of the "Monarch."

With respect to this last cargo, it appears that it was purchased under these circumstances.

The "Monarch" had been detained and employed by *Hunter and Co.*, on behalf of *Sayers*, in various voyages on account of *Sayers*, from the month of February, 1860, when she arrived, till the month of November, 1860.

The exact time when *Hunter and Co.* heard of the insolvency of *Sayers*, and of his assignment to trustees for the benefit of his creditors, does not appear. We collect that they had not done so on the 23rd of June, for on that day they wrote to *Sayers* to say that they should wait for the April mail, which had not then arrived (which would, no doubt, convey the intelligence), and if they received by it no counter orders they would have the "Monarch" put in order and set about purchasing her cargo of sugar.

On the 6th of August they wrote to Captain *Bremner*, who seems to have been authorised to act on behalf of the trustee, and who had called at Batavia on his road to the Mauritius, in these terms:—

"Batavia, August 6, 1860.

"Dear Sir,—Previous to your arrival from Australia we had waited two mails, expecting to hear from the trustees of the estate of Mr. *Sayers*, relative to the disposal of the funds in our hands. Not having heard, we determined on fulfilling his (Mr. *Sayers*) original instructions, and load the 'Monarch' back to Sydney, and we accordingly contracted for the sugars only a few days before your arrival.

"We have perused Mr. *Sayers*' letter, and also the one to ourselves, likewise Messrs. *Irring* and *Cooks*' letter authorising you to act in the matter, and we are glad to see that we have adopted the course that they wished.

"We shall endeavour to close Mr. *Sayers*' account to a point, and shall make up his account current with interest calculated to the time at which we render it."

Under these circumstances, thus collected from the correspondence, the sugars by the "Monarch" were purchased. They were dispatched on the 8th of November, 1860, consigned to *Sayers*, and arrived in Sydney, and were sold in January, 1861.

It may be admitted that if *Sayers* had remained solvent, the plaintiff would have had the right which he now claims. But upon what ground? Not because the sugars had been purchased with his money? not because he had a lien on the monies with which they had been purchased; not that he had any contract with *Sayers* that the sugars should be purchased; but upon this ground, that *Sayers* had agreed that any sugars which he should purchase in Batavia should be subject to the plaintiff's claim, and these sugars having been purchased by him in Batavia and consigned to Sydney, they would have been, as his property, bound by his agreement.

But the sugars actually purchased were not purchased by him, or with his money, or on his account. They were purchased by the agents

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in Batavia on account of the trustees, with their money, and consigned to *Sayers* only as their agent.

It was argued that the trustees must be considered to have adopted the contract of *Sayers*, and to have purchased the sugars subject to the equities of the plaintiff under such contract. There would be great difficulty in holding that they had adopted the contract of *Sayers* by not interfering with the instructions given by him to his agents as to the investment of their funds in sugar. But the strong objection to this argument is, that there was no contract between the plaintiff and *Sayers* as to the purchase of the sugars. *Sayers* was at liberty, as far as any engagement with the plaintiff was concerned, to buy sugars or not. The trustees thought that the investment in sugar was a good employment of their monies, and they therefore sanctioned it; but they did not thereby sanction a charge upon their property which might have attached upon the goods if they had remained the property of *Sayers*.

The reasoning upon which the Supreme Court has proceeded appears to us to be satisfactory, and we must humbly advise Her Majesty to affirm the decree appealed from, with costs.

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CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
NEW SOUTH WALES,
IN EQUITY.

BEFORE
HIS HONOR SAMUEL FREDERICK MILFORD, ESQ.,
The Primary Judge in Equity.

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RATTRAY *against* BLANCHARD.

December 24.

THIS was an appeal to the Primary Judge from the decision of the Master in Equity, allowing certain exceptions in the answer of the defendants to the plaintiff's amended bill.

The facts of the case as stated in the plaintiff's bill were as follows:—About the year 1843, one *John Jones* agreed to sell some land in Sydney to *John Terry Hughes* and *John Hosking*, in consideration of an annuity of £250. This agreement was carried into effect by certain deeds and instruments—the dates, particulars, and contents of which were unknown to the plaintiff, whereby the said *John Jones* became a trustee of the said lands interest to secure to himself the payment of the annuity, and subject thereto in trust to convey the premises to *John T. Hughes* and *J. Hosking*. The purchasers entered into possession; but on the annuity falling into arrear, *Jones* entered into possession and remained in possession until his death in 1848.

In suit by purchaser from *J. J.*, deceased, against the trustees of his will, relating to the land purchased, *Held*, that the late solicitor of *J. J.*, and the present solicitor of the trustees, were bound to inform the trustees of the deeds in their respective possession, relating to the said lands, and that the trustees were bound to enquire of them and make discovery thereof to the plaintiff.

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The defendants were his executors and trustees. By certain mesne transactions the lands passed to the plaintiff, who charged that the annuity had been paid off, and prayed for a conveyance of the land.

In the fourteenth paragraph of his amended bill the plaintiff charged "that the Hon. *George Allen*, of Toxteth Park, Sydney, Esquire, formerly carried on business as a solicitor of this honorable Court at one time, alone, and subsequently in partnership with *George Wigram Allen*, one of the present members of the firm of *Allen, Bowden and Allen*, of Sydney, solicitors, who now act as the solicitors of the defendants, and that the said *G. Allen*, both before the said *G. W. Allen* was in partnership with him, and also subsequently thereto, acted as the solicitors of the said *J. Jones*, and especially in reference to the matters hereinbefore mentioned; and that there are now in the possession of the said *G. Allen*, or in the possession of the said firm of *Allen, Bowden and Allen*, or some or one of the members thereof, and under the control of the said *G. Allen*, divers documents, papers, and writings, consisting of deeds, drafts of deeds, copies of and extracts from deeds and other documents, papers, and writings, including the probate of the will of the said *J. Jones*, relating to the matters hereinbefore mentioned, or some of them—the said documents, papers, and writings having come into the possession or under the control of the said *G. Allen*, as the solicitor of the said *J. Jones*; and the plaintiff charges that all such documents, papers, and writings, are under the control of the defendants, as such trustees of the said will of the said *J. Jones*, as hereinbefore mentioned, and that they ought to set forth a full and complete list or schedule of the same; and for that purpose, that they ought to make an enquiry of the said *G. Allen* and of their said solicitors, and that they ought to set forth whether they have made any and what enquiries, and state the result of such enquiries, if any, as they have made." And the plaintiff further charged that the defendant had and did, of purpose, abstain from making such enquiries.

The defendants, by their answer, admitted that *G. Allen* carried on business as solicitor at one time, alone, and subsequently in partnership with *G. W. Allen*, one of the firm of *Allen, Bowden and Allen*, the defendants' solicitors, and that he acted as solicitor for *J. Jones*; but that they were unable, "from their knowledge, information, or belief," to state whether he did at any time act as such solicitor in reference to any of the matters in the plaintiff's bill referred to; and that they were unable to state, "from their knowledge, information, or belief," whether there are now in the possession of *G. Allen*, or of the firm of *Allen, Bowden and Allen*, any documents, papers, &c., or whether the said documents, &c., if any such there be, related to the matters in the said bill mentioned, but admitted that one of the defendants had the will of *J. Jones*; and that they did not know whether the said documents, &c., came into the possession or under the control of *G. Allen*, as solicitor of *J. Jones*, or in any other manner, inasmuch as with the exception of the said will they were not aware that there were any such documents, &c., in existence; and that they could not from their knowledge, information, or belief, state whether they or any of them (if they or any of them were in existence), were under their control, or under the control of their co-defendant as the trustees of the will of *J. Jones*, inasmuch as they were not aware that there were any such documents in existence; and they said that they had made no enquiries of the said *George Allen* or of their solicitors, and submitted that they were not bound to make any such enquiry.

To this answer the plaintiff excepted that the defendant had not answered whether *G. Allen* did not act as solicitor of *J. Jones* in reference to the matters in the fourteenth paragraph of the said bill referred to; whether there were not now in the possession of the said *G. Allen*, whether or not under his control, divers documents, &c.; whether there were not now in the possession of the firm of *Allen, Bowden and Allen*, or some or one and which of the members thereof, divers documents, &c.; whether

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the said documents, &c., did not come into the possession or under the control of the said *G. Allen*, as the solicitor of the said *J. Jones*; and whether all such documents, &c., or some and which of them, were not under the control of the defendants, as such trustees of the said will of the said *J. Jones* as in the said bill mentioned; and that the defendants had not, in and by their answer, set forth a full and complete list or schedule of the deeds, &c., in the said fourteenth interrogatory enquired after.

Milford for appellants. It is contended that from the position of the parties we should have made enquiries from *George Allen* whether he acted as solicitor in the matters in the fourteenth paragraph of the bill mentioned, although he is not now a partner in the firm of our present solicitors. We submit that we are not bound to enquire into the transactions between *George Allen* and *Jones*. If *G. Allen* had been our solicitor in those transactions, or if we had been in any way interested in them, we might have been so bound. *G. Allen* holds these deeds not on behalf of us the representatives of *Jones*, but of those beneficially interested under *Jones*'s will. We have no right to the deeds—we have not got the legal estate. *G. Allen* should have been made a party for the purpose of discovery. Even if the deeds had come into the hands of our solicitors, we would not be bound to admit them or enquire for them, because they would have come into their hands, not through us, but as being the successors of *G. Allen*. A representative is not bound to make the same enquiries as the owner of a property; *Wigram on Discovery* (a), *Mackintosh v. Great Western Railway* (b), *Lord Glengall v. Fraser* (c), *Attorney General v. Reads* (d), (e), *Christian v. Taylor* (f).

Gordon for the respondent. An answer may be verbally sufficient but materially insufficient. If the

(a) p. 209.
(c) 2 H.
(e) 8 Beav. 19.

(b) 4 De G. & S. 502.
(d) 12 Beav. 52.
(f) 11 Sim. 401.

plaintiff has a right to the discovery, it is in the defendants' power to obtain it. The defendants claim through *Jones* as his representatives, and *G. Allen* is admitted to have been *Jones*' solicitor. We seek now discovery only of these deeds; *Mitford's Equity Pleading* (a), *Neate v. Duke of Marlborough* (b), *Stuart v. Lord Hill* (c), *Attorney General v. Rees* (d), *Taylor v. Rundell* (e), *Mackintosh v. Great Western Railway* (f).

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Milford in reply.

The PRIMARY JUDGE. I must consider this question from two points of view—firstly, as regards *George Allen*; and secondly, as regards the present firm of Messrs. *Allen, Bowden* and *Allen*. As to *George Allen*, the question is whether he can be compelled to inform the defendants what deeds he has in his possession. I think he can. He was attorney for *Jones*, and as such got possession of these deeds. Now this suit is instituted in reference to the very estate, in respect of which the deeds were handed over to him. The defendants are the representatives of that estate, and *G. Allen* is bound to give them the requisite information. The defendant is not bound to go and seek for evidence, but if he can obtain it by enquiring of a person who is bound to furnish him with the information he must do so. Secondly, as to the present firm; this is a suit in which they are acting as the solicitors, and they are bound to tell the defendants what deeds are in their possession relating to the matters in dispute. The deeds have been traced into their hands as coming from *Jones*. I refer now only to the discovery of the deeds, and say nothing as to the production. The appeal must be dismissed with costs.

(a) p. 365 n.
(b) 1 Ph. 222.
(c) Cr. & Ph. 113.

(d) 2 M. & K. 35.
(e) 2 Deg. & S. 544.

February 17.

RODD *against* HICKEY.

Form of exceptions to Master's report, framed on the precedent of *Freeman v. Fairlie* allowed, where there had been no application to take them off the file.

THESE were exceptions by the plaintiff to the Master's report, on an account directed to be taken by the decree at the hearing.

To the Master's report were appended schedules specifying the several items of the account, and the exceptions were directed to the total amounts found due in some of the schedules, without mentioning any of the items which were objected to.

Gordon, for the defendant, took a preliminary objection to the form of the exceptions. The exceptions ought not to have been taken generally to the amount stated to be due in the schedules, but each item should have been separately specified, otherwise we cannot know what really are excepted to. According to the old practice, a formal objection was taken to each item in the Master's office, and then those objections were turned into exceptions to the Master's report. That practice has now been abolished, and it is impossible to ascertain whether all or only a few of the items are objected to. If I had moved to take these exceptions off the file, the Court would have done so. *Ballard v. White* (a), 2 *Smith's Ch. Pr.* (3rd Ed.) (b).

Broadhurst, Q. C., and *Milford* for the plaintiff.

The defendant cannot now object to the form of the exceptions, he should have moved to take them off the file. *Ballard v. White* shews that this is so. These exceptions are framed on the precedent of *Freeman v. Fairlie* (c), set out in *Van Heythuysen's Equity Draftsman* (d). Where there are schedules to the report, the proper form of exception is to the result of the schedules. In excepting to the Master's finding as to

(a) 2 *Ha.* 158.
(c) *Mem.* 24.

(b) p. 395.
(d) *Vol. 2*, p. 140.

the sufficiency of an answer, it is unnecessary to specify particulars.

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Gordon in reply. The exceptions in *Freeman v. Fairlie* (a), were made to the allowance of a commission to an executor, who had received a legacy as compensation for his trouble. The objection was, that no such commission should have been allowed on any of the items. It was, therefore, quite clear what were the items to which the exceptions were taken. Moreover, the old practice was in force when that case and that of *Ballard v. White* were decided. In exceptions as to the insufficiency of an answer, each part of the answer is objected to, and on these separate objections the Master has to decide.

The PRIMARY JUDGE. I must decide this point on the case of *Ballard v. White*. If the application had been to take these exceptions off the file, I think the Judge who decided that case would have granted the application; but as that has not been done, I must exercise my discretion as to whether I can allow these exceptions to be proceeded with. I think they ought. There are objections to both forms of exceptions. If each item be excepted to, the exceptions would be very voluminous. The schedules shew each item, and the parties must know the objection to each which was taken before the Master.

It is not considered necessary to report these exceptions further, as no other point of law arose.

(a) *Supra.*

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March 8, 11, 15.

In suit for specific performance, defendant claimed compensation as having been misled by plaintiff's misdescription.

Held, that as defendant had opportunity to verify the description, he could not claim compensation; but as the difficulty arose from plaintiff's misdescription each party should bear their own costs.

THIS was a suit for the specific performance of an agreement to purchase two stations, named Urara, and Jerrigobilly, together with 1,500 head of cattle, constituted by the following agreement, and by the following letter from the plaintiff to his agent, dated the 21st day of February, 1863:—

Sydney, 21st February, 1863.

Mr. *Forbes*. Sir,—You may sell Urara run, situated in the Murrumbidgee district, which is all fenced in; the boundaries are all agreed upon. The measurement of the run is about twelve and a half miles long by about seven and a half miles and eight miles. The run is to be sold according to the Government description, which is as described. With this property I will sell about 1,500 cattle, six months and over to count, under given in; also, with Urara (which is about seventy miles from Wagga Wagga), I will sell Jerrigobilly, on which are a portion of the above cattle. The rent and assessment of Urara is about £120 per annum, that of Jerrigobilly is £50 per annum. This run I bought at the sale in March last—is known as Nunnerenang, and is in the same district. This run is about eighty-five to a hundred miles from Urara. Both runs are splendidly watered. I will muster the cattle at both places, and deliver the number stated. After the delivery is completed, the right of brand to become the property of the purchaser. The time for mustering to be three months if required. There are about sixteen stock horses, and some bush mares, there is a pole dray, three working bullocks, some stores, &c., &c., all of which, together with all the stations, to be given in for the sum of ten thousand pounds. There are huts and a dwelling. The terms to be one-third cash, residue at one and two years, in equal amounts, with eight per cent. added to the bills, all secured by a regular mortgage on the stock and stations. The brands are Co N rump of some cattle 55, some cattle ~~at~~ rump and shoulders of some cattle, 52 some cattle, 55 some cattle. The herd will be found to be half male, half female, about 150 speyed cows. I have shot all the bulls excepting one; should there be any deficiency in the number of 1,500 delivered, I will, from £10,000 the amount of purchase money, allow at and after the rate of £3 per head to all short delivered.

I remain, dear Sir,

Yours, &c., &c.,

George Talbot.

This offer to be binding for three months from this day.—G. T.

Copy of original.

Robert Forbes,
Robert Napier.

“Memorandum of agreement made and entered into this eighteenth day of April, 1863, between *Robert Forbes*, acting for and on behalf of *George Talbot*, Esq., of Sydney, hereinafter designated vendor of the one

part, and *Robert Napier*, Esq., of Sydney, acting for and on behalf of *A. Cunningham*, Esq., of Lanyon, Queanbeyan, hereinafter designated vendee of the other part. Vendor agrees to sell, and vendee consents to buy, all those blocks of country stations or runs known as "Urara" and "Jerrygobilly," both situated in the Murrumbidgee district, and which are sold and bought as described in a letter signed by vendor, and dated 21st February, 1863, copy of which is annexed, authorising the sale of these runs, and which, on behalf of vendor and vendee, is to be considered (notwithstanding anything to the contrary as herein stated) the manner and way in which the properties are to be sold and bought. Now the said letter sets forth that the runs as therein named are as specified, and the cattle and all belonging thereto are as described, and that in consideration of the clauses and conditions therein contained vendor does so agree to sell, and vendee consents to buy the same for the sum of ten thousand pounds, which is to be paid in the following way, say—one thousand pounds cash on signing of this agreement; two thousand three hundred and thirty-three pounds six shillings and eightpence on order for delivery being given, and the remaining two-thirds by bills at one and two years date in equal amounts, with eight per cent. interest added thereto, all secured by a regular mortgage on the stock and stations, such bills to be dated from date of purchase, which bills together with the mortgage deed are to be held by the within-named agents until delivery is complete, when the same are to be handed over to vendor. And we, to ratify this sale, have, as agents, hereunto attached our signatures, and to the letter annexed, acknowledging that the same is a true and correct copy, and that this is a sale of the property now sold. The proportion of rent and assessment to be paid by vendee to vendor to date of purchase. The one thousand pounds cash instalment, as herein referred to, is to be deposited in the Commercial Banking Company, Sydney, in the joint names of *Robert Forbes* and *Robert Napier*, until such time as the said *Robert Forbes* hands over to the said *Robert Napier* the order for delivery, when this sum of one thousand pounds is to be transferred to the name of *Robert Forbes* only, and this, together with two thousand three hundred and thirty-three pounds six shillings and eightpence, is to be paid and paid to the credit of said *Robert Forbes*, on behalf of said *George Talbot*. As agent for *George Talbot*, *Robert Forbes*; *Robert Napier* as agent for *Andrew Cunningham*, the vendee herein. Witness, *T. Ingold*.

The contract was dated the 18th day of April, 1863, and the purchaser having had three months given him to inspect the stations, and to satisfy himself generally as to whether the purchase should be binding on him or not, sent his son within that time to the station of Urara, and appeared to be satisfied.

There is no dispute as to the Jerrygobilly station; the only dispute is as to the Urara station, which is alleged to contain only half the quantity of land which the defendant supposed it to contain, and which, as he says,

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he was led by the plaintiff to suppose it to contain; and he asks for compensation in respect of the deficiency in the quantity. He says he was led to suppose that he was to have about 96 square miles, because the description of the extent, contained in the letter, is "12½ miles long by 8 and 7½," which he construes to mean a four-sided figure, having a base of 12½ miles, and having one of its sides 8 miles, and the other 7½ miles, with right angles at its base, so that by joining the other extremities of the lines by a line of about 12½ or 13 miles an area would be included of about 96 square miles, and in support of this he says that the assessment and rent of £120 stated in the letter points out a run containing 96 square miles, rather than a run of 38 or 40 square miles, which is the actual area of it. He says that if this were not an actual fraudulent representation, yet that he was deceived by it, and that being induced to make the contract by such representation of the plaintiff, he ought to have compensation for the deficiency in the extent of the run.

Sir W. Manning, Q. C., and Milford for the plaintiff. The defendant, to entitle himself to compensation, should shew that the misrepresentation was such as to enable him to rescind the contract if he pleased. The three lines mentioned in the contract would, *prima facie*, shew that the figure of the run was that of a triangle, not a parallelogram. There was also a reference to the government description which would have shewn what the area of the run actually was. The run was all fenced in, and before the contract was completed, the defendant's son was on the station inspecting the cattle. The two stations are included in this contract, and sold for a lump sum, so that it is now impossible to compute the amount of compensation. The defendant has, moreover, entered into possession, and has sold some of the fat cattle. *Fry* on Specific Performance (a), *Dyer v. Hargrave* (b), *Attwood v. Small* (c), *Trower v. Newton* (d), *Lisney v. Selby* (e), *Jennings v. Broughton* (f).

(a) *193-8, 200, 249.* (b) *10 Ves. 505.* (c) *6 Cl. & F. 447.*
 (d) *3 Mer. 704.* (e) *2 Ld. Raymond.* (f) *5 Deg. M. & G. 126.*

The *Attorney-General* and *Gordon* for the defendant. The government description would not disclose the area of the run without a survey. The words "12 by 7½ and 8," refer to length by breadth, and would give a parallelogram, the extreme length of which was 12 miles and the breadth 7½ and 8 miles respectively. The assessment mentioned in the contract would be that of a run such as we understood this to be. It turns out now that only half the amount mentioned in the amount actually payable on the run. The station is very large, and partly swamp and wood, so that it would be impossible for the defendant's son to have ascertained the extent and area by riding a few times after the cattle. We were put off enquiry by the statement that the Government description would shew a run of 12 miles by 7½ and 8. The defendant's entering into possession will not interfere with his claim to compensation. To make an entry a waiver, the intention to waive must be shewn; but here we entered under protest. The construction which the defendant put upon the words of the contract, was such as any man of ordinary intelligence would put on them. A knowledge of the inaccuracy of the representation must be distinctly shewn, not merely surmised. In the case of *Attwood v. Small* (a), a committee had been sent to verify the description. *Sugden's V. & P.* (b), *Fry on Specific Performance* (c), *Hill v. Buckley* (d), *Cockcroft v. Roebuck* (e), *Knatchbull v. Gruber* (f), *Martin v. Cotter* (g), *Wall v. Stubbs* (h), *Leland v. Illingworth* (i), *Swainsland v. Biersley* (k), *King v. Wilson* (l).

Sir W. *Manning*, Q. C., in reply. The assessment is calculated according to the grazing capabilities of the run, not according to its area. The reason why the words "12 miles by 7½ and 8" were introduced, was that the plaintiff paid for so many miles of fencing, when having the whole run fenced in. In point of fact the

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(a) <i>Infra.</i>	(b) <i>Pa. 269, 286-8.</i>	(c) <i>Pa. 198, 5-6, 202.</i>
(d) <i>17 Ves. 401.</i>		(e) <i>1 Ves. 221.</i>
(f) <i>1 Madd. 170; S. C., 3 Mer. 124, 130.</i>		(h) <i>1 Madd. 80.</i>
(g) <i>3 J. & L. 496, p. 507.</i>		(k) <i>30 L. J. Ch. 652.</i>
(i) <i>2 Deg. F. & J. 248.</i>		
(l) <i>6 Beav.</i>		

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measurement is true, and the defendant has no justification for construing the words as he did. He has availed himself of the means of correcting any impression he may have formed, by visiting the station itself.

March 30. The PRIMARY JUDGE having recited the facts of the case as above stated, proceeded:—

If there had been nothing in the contract or letter to affect the construction of the words $12\frac{1}{2}$ by 8 and $7\frac{1}{2}$, I should have been disposed to consider them to indicate a triangle having the base of $12\frac{1}{2}$, with the two sides, one of 8 and the other of $7\frac{1}{2}$ miles, rather than a quadrilateral figure, and the shape of the run if not an exact triangle of this description approaches nearly to it. The difficulty I have felt arises principally from the amount stated in the letter to be payable for rent and assessment, and although the assessment is not fixed by law according to the extent of a run, but according to its grazing capabilities, I think the defendant may have well supposed that the run would comprise a much larger area than thirty-eight or forty square miles. I think, moreover, that the plaintiff, before he offered the run for sale, was bound to know what the assessment and rent were if he chose to state them, and then to state them correctly, and if the defendant were by this statement led to believe the run to be a four-sided figure, and therefore to contain a much greater extent of country than it does, the fault would lie with the plaintiff, and the defendant would be entitled to have the contract specifically performed, with compensation.

There are other circumstances, however, which materially alter this view of the case. The letter of the 21st day of February, 1863, on which the contract is founded, refers to the Government description as that by which the sale is to be made, but at the same time states that such description is the same as that set out in the letter. Now, supposing the defendant to have had doubts in his mind as to whether the " $12\frac{1}{2}$ miles long by 8 and $7\frac{1}{2}$ " meant a four or a three-sided figure (and that is taking it most favourably for him, for he could

not have been certain that a four-sided figure was intended, or if so, that the angles at the base were right angles), it was his duty to have referred to the Government description, and if that did not satisfy him, to the Government plans or other documents which might have cleared up such doubts. Again, the defendant had three months allowed for the inspection of the run, and he did inspect it by his agent. The run was all fenced in, and although a person by merely riding over a run cannot ascertain its extent to within a few square miles, yet he can ascertain whether it approaches more nearly to ninety-six square miles than thirty-eight or forty. At all events the defendant's agent had an opportunity, if he chose to avail himself of it, to ascertain the extent, but he did not. It is also worthy of observation that the angle made by the fences at the north of the run is so acute that it is difficult to conceive a run having four sides with an angle of that acuteness. I think, therefore, that the defendant has not used the means in his power to clear up the doubt engendered by the description of the plaintiff. Under these circumstances the defendant could not, upon bill filed by him, have successfully asked the Court to decree a specific performance with compensation.

This leads me to consider the subsequent circumstances of the case. After the contract was entered into, disputes arose as to the extent of the run, but the contract on the plaintiff's part was nevertheless completed. The defendant took possession of the run and cattle, and gave a receipt to the plaintiff's agent, as he expresses it in the receipt itself, "under protest," by which I understand him to mean that he intended to insist on his right, whatever it might be, to compensation or damages in respect of the deficiency of extent of the run. He did not attempt to rescind the contract, but, on the contrary, took possession of the subject of it, insisting on his legal rights. Now, I have before stated that he could not have filed a bill against the plaintiff for specific performance with compensation—what right then has he, as a defendant in this suit—a suit nominally for specific

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performance of the agreement, but not in fact one for that purpose, because, as I understand it, a suit for specific performance supposes that the contract is open on both sides. In the present case, the plaintiff has done all that he could or was bound to do, and asks that the defendant may be compelled to do what he has engaged to do. He has parted with his cattle and horses, many of which have been sold by the defendant, and the defendant had occupied the run. Under these circumstances, the plaintiff is clearly entitled to compel the defendant to perform his part of the contract; and as the defendant could not claim compensation as a plaintiff, and as he in this suit claims that right, as if he had filed a bill, a right to which he is not entitled, from his want of vigilance, the decree must be as prayed by the bill. I do not, however, think that the plaintiff is entitled to costs, as the original difficulty arose from his misdescription. Each party will bear his own costs.

I may add that if the defendant had sought to rescind the contract when he first discovered the deficiency in the run, instead of carrying it out, I should not have made a decree for specific performance.

April 12.

RITCHIE *against* PRICE.

Trustees of will take legal estate by implication, where such estate necessary for the performance of the duties imposed on them. The circumstance of there being a gift of the estate to the person beneficially interested, not sufficient to prevent this implication arising.

IN this case a sale of certain land had been ordered, by a decree of the Court, to pay the debts of the testator, and the costs of the suit. A sale had been effected, and the purchaser having objected to the title on one point, it was arranged that he should move the Court to declare the title bad, and to discharge the purchaser from his contract, thus dispensing with a reference to the Master for him to report on the title. The Court assented to this arrangement, as there was only one objection made, viz., that a devisee of part of the property is not a party to the suit.

The testator, *John Ritchie*, made his will in 1860, and thereby appointed *Charles Price* and *Thomas Fowler*

Simile—sects. 30 and 31 of 1 Vic., c. 26, apply to estates by implication.

executors and trustees of his will. He gave to *Charles Price* and *Ellen*, his wife, a piece of land, containing 150 acres, to hold to them for their respective lives, and after their deaths he gave the same to all and every the child and children of his said daughter, *Ellen Price*, to hold, to them, their heirs and assigns, on the youngest of the said children attaining the age of twenty-one years, and the rents and profits of the said piece of land in the meantime to be received and taken by his said executors, and to be applied by them for the benefit of the said children, and if any or either of the children of his said daughter should die under the age of twenty-one years unmarried and without lawful issue, then he gave the share or shares of him, her, or them so dying unto the survivors or survivor of them in equal shares their heirs and assigns for ever.

The testator then gave a piece of land, containing 110 acres, describing it, and he directed that it should be divided into three equal portions (describing how), and the first of the divisions he gave to his son, *George Ritchie*, to hold, to him and his heirs for ever. He then disposed of the other two divisions to his daughters *Jane* and her heirs, and *Elizabeth* and her heirs, and he directed that the said three several devises should become vested in the three devisees at their respective ages of twenty-one years, and that the rents and profits of their respective shares should be applied for their respective use and benefit, during their respective minorities (not saying by whom); and the testator directed that if any or either of his last-named children should die before attaining their respective ages of twenty-one years unmarried and without lawful issue, then he gave the share or shares of him, her, or them to the survivors or survivor of them in equal shares, and to their heirs and assigns for ever; and the testator gave to his trustees and executors a certain dwelling-house and land, and his furniture upon trust, to allow his wife, *Catherine Ritchie*, to receive the rents and profits thereof for her own use during her widowhood; and after the death or marriage of his wife he gave the same unto his son, *George*

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Ritchie, to hold, to him, and his heirs for ever, on attaining twenty-one years of age. And he gave the residue of his real estate to his son, *George Ritchie*, to hold, to him, and his heirs for ever, on attaining the age of twenty-one years, and the testator directed that with respect to both of the last-named devises to his son *George*, the rents and profits of the same should be received and taken by his executors, and paid and applied for his use and benefit during his minority, and if his said son should die under age without leaving lawful issue, the testator directed that the said property was to be divided between his surviving sisters, and the children of such of them as might be deceased, who were to take their deceased parent's share on attaining the age of twenty-one years, and the testator directed that his trustees and executors should have the power of appointing any one or two persons as executors and trustees of his will, to carry the same and the trusts thereof into effect, who were to act as such trustees and executors as if appointed by himself, the testator.

At the time of the death of the testator, all his children were under age. The devisee, *George Ritchie*, was still under age, and not a party to the suit.

Broadhurst, Q. C., for the purchaser. The decree is bad, as having been made in the absence of one of the parties whose interests were to be bound by it. The legal estate was not in the trustees of the will, and therefore they could not represent *George Ritchie*. The devise was direct to him, and therefore there cannot be any estate in the trustees. There cannot be an implied estate where there is an express one. The words "to vest at 21," refer only to the vesting in possession. The clause as to maintenance is only a power, and cannot confer any estate contrary to the express devise; *Wood v. Wight* (a).

Milford for the plaintiffs, the vendors. Where there are active trusts to be performed by trustees requiring the legal estate, there the legal estate will be held to be

(a) 4 M. & C. 470.

in the trustees, although there is an express devise to a person beneficially interested. The appointment of the trustees shows that they were to perform the duties required by the provisions of the will. *Ritchies'* estate does not vest until 21, and during his minority, the rents and profits are to be applied to the maintenance of the infant. The application of the rents implies a right to receive, which is an active duty, requiring the legal estate. There is no express devise to the infant until he attains the age of 21. If the trustees have the legal estate during the minority of *G. Ritchie*, they represent his estate sufficiently for the purposes of this suit. [By the Court. There is a partition to be made, and the trustees must have full power to effect this]. To do this they must have the legal estate. In the trusts of *Hough's* Will (a), *Plenty v. West* (b), *Anthony v. Rees* (c), *Trent v. Hanning* (d), *Oates v. Cooke* (e), *Doe dem Woodhouse* (f), *Greatrex v. Homfrey* (g), *Villiers v. Villiers* (h), *Gillard v. Gillard* (i), *Gibson v. Lord Montford* (k), 2 *Jarman on Wills* (l), *Lewin on Trusts* (m).

Gordon for the trustees. This is a suit for administration, and the residuary devisees are plaintiffs, and can obtain a decree in the absence of their co-residuary devisees. 17 Vic., No. 7, sect. 32, *Lewin on Trusts* (n), *Tudor's Leading Cases in Conveyancing* (o), *Re Turner* (p).

Broadhurst, Q.C., in reply. Where there is an express devise to the person beneficially interested, a superadded authority to receive the rents cannot pass the legal estate. In none of the cases cited was there any express devise.

(a) 4 De G. & S. 371.	(b) 6 C. B. 201.
(c) 2 C. & J. 75.	(d) 10 Ves. 494.
(e) 3 Burr. 1684.	(f) 4 Term. R. 89.
(g) 6 A. & E. 209.	(h) 2 Atk. 72.
(i) 5 R. & A. 785.	(k) 1 Ves. 485.
(l) pa. 242, 250.	(m) p. 250.
(n) p. 250.	(o) 267-8-9.
(p) 2 Deg. F. & J. 52.	

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April 15.

THE PRIMARY JUDGE having recited the facts of the case as above, continued:—

The question for consideration is whether the legal estate in the property given to *George Ritchie* is in him or in the trustees of the will, for if he take the legal estate he ought to be a party, and without his being before the Court his interest would not be bound by the decree, and the title would be bad; but if he take only an equitable estate, and the legal estate is vested in the trustees, they represent him, and his interest being bound by the decree, the title is good.

As to the first devise there is clearly some of the interest of the fee undisposed of. Suppose *Charles* and *Ellen Price* were to die, leaving children under twenty-one, what is to become of the estate till all the youngest attains twenty-one, if not in the trustees and executors—and so supposing all the children should die under twenty-one, and unmarried, what is then to become of the estate? It would result to the heir at law. The rents and profits, after the death of *Charles* and *Ellen Price*, are to be taken by the executors; to do this they must have an estate. However, it is not with this devise I have especially to deal.

It is quite clear that an estate may by implication be given by a will to trustees, though there be no actual words of gift, if it be necessary that the trustees should have an estate in order to perform the duties imposed on them.

It also appears from the case of *Anthony v. Rees* (a), and other cases, that the circumstance of there being a gift of the estate to the person intended to be beneficially interested, is not sufficient to prevent this implication arising. A devise of a legal estate may be implied, though the equitable estate may be given to another person. Every case must depend on the wording of the will as indicating the intention of the testator. If we gather from the will that the testator must have intended the trustees to have the legal estate, the Court will suppose that he gave it to them.

(a) 2 C. & J. 75.

I do not conceive that the appointment of the trustees in the commencement of the will would by itself have the effect of vesting the whole of the testator's property in them, but we must look at each separate devise to see whether it gives them the legal estate in that specific devise—i.e., whether, in order to effectuate the testator's intention, we must suppose the trustees to take the legal estate.

Now, with regard to the devise of the 110 acres. It is to be divided into three equal parts, in the way pointed out by the testator, so that so far as the division itself is concerned there would be no necessity to call in the assistance of the trustees, and if so no conveyance would be necessary; for, although the testator says the land is to be divided, he himself divides it, and each devisee takes his share without the intervention of anybody. The testator has, however, directed that the devisees should not vest till the devisees respectively attain the age of twenty-one years, and that in the meantime the rents should be applied for the benefit of these devisees respectively. Now there being no vested estate, and no person appointed to receive the rents and apply them as directed, it is to be inferred that the testator intended the trustees to do so, and in order that they may do so, the legal estate must be held to be in them—mere power to receive the rents would not enable them to distrain, or otherwise to act as the owner of the estate.

The next devise is of the dwelling-house to the wife for her life, with remainder to *George Ritchie* if he should attain twenty-one years of age, with a direction that the rents should be received by the executors and applied by them for his benefit. The same observation applies here as in the former case—the executors, in order to perform this trust, should have the legal estate. The same observation applies to the residuary devise. It was argued that the circumstance of an express estate being given to the trustees in the devise of the house and land to the widow for life, shows that the trustees were not to take any estate in the other devises, and that the

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mention in some of the devises that the executors are to take the rents and apply them, shows that they were not the persons intended to take them when not expressly mentioned.

No doubt these circumstances tend to the construction contended for, but it appears to me that taking the whole of this irregularly drawn will they are not sufficient to control the construction I have considered as pointing to a legal estate being vested in the trustees. Since the Wills Act, 1 Vic., c. 26, the difficulty which before arose in cases of this kind as to the amount of the interest to be taken by the trustees, is to some extent removed by the 30 and 31 sections of the Act. By the 31st section it is enacted that when any real estate is devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in it shall not be given to any person for life, or being given to any person for life, the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee and not an estate determinable when the purposes of the trust are satisfied.

Now, as this clause of the Act is not confined by words to estates expressly given to trustees, I conceive it must apply to estates impliedly given to them, for in either case they are given by the will. Once admit that some estate is vested in a trustee by virtue of the will then the 30th and 31st clauses apply. In the present case, the purposes of the trust relating to the share of *George Ritchie* in the 110 acres may extend beyond his life, as if he were to die under twenty-one years of age the rents would have to be received during the lives of the survivors being underage, and the beneficial interest he takes exceeds a life estate, so that this clause of the Act applies, and the legal estate in fee is vested in the trustees. Besides, the estate given to him in all the devises in which he takes an estate is not a life estate, but a fee to vest in him on a contingency, and in the devise of the dwelling-house and the residue, the estate, in the

case of his dying under twenty-one and unmarried, is to be divided without the testator saying by whom, and yet the trustees are trustees of the will, and have a power given them to appoint new trustees to carry the same into execution, and to act as the original executors and trustees. It may be observed too, that the executors and trustees are directed to sell the furniture after the widow's death, and they are trustees of both real and personal estate. As this is the only objection taken to the title, I think it must be overruled, each party paying his own costs.

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March 15.

THIS was an application to set aside an attachment which had issued against *Browne* for not having put in his answer, on the ground that in the affidavit on which the attachment was founded the name of a month had been erased, and that of another substituted without having been initialed by the Commissioner, before whom the affidavit had been taken.

Motion to set aside attachment obtained *ex parte* on an irregular affidavit dismissed, as affidavit still on the file.

Gordon for the defendant. The attachment was obtained *ex parte* upon what is now shewn to be not an affidavit at all. Where the proceedings are against the liberty of the subject, the Court will require the utmost regularity. The Court would dissolve an *ex parte* injunction, on the ground that a material fact had been withheld without considering the merits of the case; *Elsie v. Adams* (a).

Butler for the plaintiff. The application should have been to take the affidavit off the file for irregularity; but as they have not done so, and the affidavit is still on the file, it is in the discretion of the Court to act upon it. If an injunction has been obtained on an irregular affidavit, it is a contempt not to obey it; the affidavit can be amended; *Petersdof's Practise of Common and Statute Law* (b), *Re Jane Denton* (c), *R v. Gordon* (d).

(a) 32 L. J. Ch. 616.
(c) 28 L. J. C. P. 255.

(b) p. 246.
(d) 25 L. J. Mag. Ca., p. 19.

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BROWNE.*Gordon* in reply.

The PRIMARY JUDGE, having consulted with the other Judges, held that the motion should have been to take the affidavit off the file, and that if such a motion had been made, leave would have been given to amend.

Motion dismissed without costs.

March 21, 22.

WENTWORTH *against* GURNER (a).

W., M. and T. being trustees of C.'s will; W. and M. left the colony, and appointed E.

by power of attorney to act for them; money belonging to the trust estate was received by Meers. G., T., and R., the solicitors of the estate (T. being also trustee), and paid out on cheques of the firm, and applied by T., with cognisance of E., in manner contrary to trusts. T. and E. being insolvent, W. and M. filed their bill against G. and R.

Held that defendants in this suit were not liable for the breach of trust. Held that Statute of Limitations

had barred any claim against defendants as agents.

THIS was an appeal from the judgment of his Honor the Primary Judge, dismissing the bill.

The facts of the case, and the judgment of the Court below, are reported *supra*, Vol. II. (b).

The *Attorney General* and *Gordon* for the appellants. The Statute of Limitations could only begin to run against *Milson* from 1859, and did not run at all against *Wentworth*, as he was abroad. The cases cited in the judgment of the Primary Judge, are those of agents who are not connected with the trustee. Here, one of the trustees was a partner in the firm of the agents; and the firm, by participating in the breach of trust, becomes liable. The Court will look to the circumstances of each case to see if there is not in it something beyond mere agency. The firm, having undertaken to hold the money on the trusts of the will, contracted a duty which they were bound to perform, and that duty was within the scope of the business of the firm; *Attorney General v. Corporation of Leicester* (c), *Tyler v. Tyler* (d), *Bodenham v. Hoskyns* (e), *Pannell v. Hurley* (f), *Wilson v. Moore* (g), *Blair v. Bromley* (h), *Coomer v. Bromley* (i), *Stuart v. Welsh* (k).

Sir *W. Manning*, Q.C., *Broadhurst*, Q.C., and *Milford* for respondents. The Statute of Limitations

(a) *Coram*, full Court.

(c) 7 *Beav.* 179.

(e) 2 *De G. M. & G.* 903.

(g) 1 *M. & K.* 126.

(i) 5 *De G. & S.* 532.

(b) p. 105.

(d) 3 *Beav.* 550.

(f) 2 *Coll. C. C.* 241.

(h) 2 *Phil.* 354.

(k) 4 *M. & C.* 305.

applies where the trusts are constructive. There was no express trust in this case. The defendants were merely money holders or bankers, unaffected by any trust whatever. An agent employed by a trustee is liable only as agent to his principal, and only becomes a constructive trustee by participating in a fraud. The defendants are not shewn to have obtained any benefit by these transactions. There is no evidence to show that the estate suffered any loss. The lands would remain the same value whether the security had been a legal or an equitable mortgage. The position of *Tompson* as trustee is totally distinct from his position as partner of the firm of solicitors as much as if there had been two persons. The money came into the hands of the firm only as a matter of convenience, that the creditors should pay the money from time to time to the solicitors of the estate, there to remain till handed over to the trust fund. Something more than mere breach of trust, some actual fraud, must be shown to make the defendants constructive trustees. [*Milford*, J. The difference between a fraud and a mere breach of trust is shown by the fact that you can have an indemnity against a contemplated breach of trust, but not against a fraud.] *Lewin on Trusts* (a), *In re Scott* (b), *Petre v. Petre* (c), *Davis v. Spalding* (d).

Gordon in reply. If there be a liability in the defendants, we are entitled to an enquiry before the master whether any loss has accrued to the estate. The Statute of Limitations of the 3 and 4 Wm. IV., c. 25, does not apply to a claim like this; and Courts of Equity only act in analogy to the spirit of the Acts of *James* and *Ann*, but are not bound by them. A knowledge of an intended breach of trust would create a liability in the defendants. The money at the first should have been paid into the Bank of New South Wales, where it would have been under the control of the trustees. The wrongful inception adds much to

(a) *574-5, 146, 334.*
(c) *1 Drew, 371, 392-3.*

(b) *8 Jr. Ch. R. 316.*
(d) *1 R. and M. 64.*

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WENTWORTH the suspicion resting upon the subsequent acts; *Lewin* on Trusts (a), *Story v. Fry* (b).

GURNEE.
v.
August 6.

The judgment of the Court was on this day delivered by.

STEPHEN, C. J. This was a suit in Equity, instituted by the now trustees of one *Robert Campbell's* will, against the late partners of one *Tompson*, a retired trustee, since deceased—seeking to make them responsible with the latter, for certain breaches of trust committed by him while such partner—with, as it is contended, the knowledge of the defendants, or, at all events, under circumstances equally implicating them. It was objected for the defendants that the suit was not instituted by the proper parties—that there was nothing in the case to show knowledge in the defendants of any improper investment of the trust moneys, or, in any event, to fix them with responsibility for it, as constructive trustees or otherwise; but, if there was any such liability (which could not be to the present plaintiffs), the claim was barred by the Statute of Limitations; since the last of the alleged misappropriations was before July, 1855, and this suit was not commenced until April, 1862.

The Primary Judge, giving no opinion on the first-mentioned point, but assuming that the defendants knew the trusts on which the moneys were held, and also that their partner was about to invest them in a manner not authorised—those moneys, at the time of the investment, being undoubtedly in the hands of the firm—held that, under the circumstances, the defendants were not responsible as constructive trustees, but at the most as agents only; and, so regarding them, he dismissed the bill on the defence of the Statute of Limitations. From this Decree the plaintiffs appealed; and, having fully considered the arguments, and conferred together thereon, and on the cases cited, we are now prepared to give our decision.

The facts are set out in his Honor's judgment; but they may shortly be stated as follows. *Wentworth* and

(a) p. 334.

(b) 1 Y. & C. C. C. 603.

Milson, two of the plaintiffs were the original trustees, and also executors of *Campbell's* will, jointly with *Tompson*. *Milson* several years ago quitted the colony, and one *Elyard* was appointed a trustee in his stead. After this, Mr. *Wentworth* left the colony, previously constituting *Tompson* and *Elyard* his agents, in respect of all the estate matters. The latter, however, appears never to have actively interfered, and *Tompson*, with his concurrence, managed the trust affairs alone—he being also solicitor to the estate, and in partnership at the time with *Gurner*. In this state of things, it seems that in the course of the years 1854 and 1855 moneys belonging to the estate, principally interest on outstanding mortgages and other investments—which ought by the will to have been kept in a bank to the credit of the trust, and at interest—were, from time to time, allowed to go to the firm of *Gurner* and *Tompson* (or, in the latter year, of *Gurner*, *Tompson*, and *Robberds*), and by the firm placed in their bank, to their own credit.

It is sworn by *Gurner*, that this was by no arrangement or wish of his own, nor is there any suggestion that it was at the instance of the junior partner.

The moneys were brought to the office, sometimes by the collector to the estate, but more generally by the debtors themselves. The truth would seem to be that neither was the system the result of fraud or wrong design, on the part of *Tompson*. It was said by him to be more convenient in the then state of affairs; *Tompson* telling *Gurner* that he was lending money for the estate to one *Henry*—in whose favor accordingly the former drew cheques, at *Tompson's* request, on nine occasions, spread over a period of thirteen months, amounting in the whole to fourteen hundred pounds.

Gurner was the only member of the firm entitled to draw cheques in the partnership name; but it turned out eventually that *Tompson* (unknown to either of his partners) was, during this period, also drawing out the estate moneys by similar cheques. These, however,

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still appear to have been for no fraudulent purpose, since they were all either in favor of the estate, or its former and appropriate banking account, or two persons named *Tindale* and *Armitage*, to whom *Tompson* lent on behalf of the estate the sums obtained by them.

Tompson moreover took from these three parties, *Henry*, and *Tindale*, and *Armitage*, deposits of their respective title deeds as security for the loans ; and the reason assigned for the giving to them of several drafts, instead of one for the whole amount, may have been a true one—that he advanced the moneys, as they were required for certain improvements in progress, on the completion of which legal mortgages were to be executed. It is right further to observe that, under such circumstances—the moneys being thus withdrawn in comparatively small amounts, and at irregular periods—there might have been a difficulty in the way of obtaining interest from any bank, had the deposits directed by the will been made. But, in not making such deposits, *Tompson* nevertheless was guilty of a breach of trust ; and his partners, in allowing the moneys to be thus diverted, whatever the motive or the excuse, would clearly have been liable for any losses thence arising. He was also clearly guilty of a breach of trust in lending those moneys on any other than legal mortgages, for such were the express directions of the will ; and very serious losses, it is admitted, have ensued from their violation.

The question is, however, whether the facts stated render the defendants liable, in this suit, for that breach of trust ? and Mr. Justice *Wise* and myself are of opinion, with the learned Primary Judge, that they do not. I am myself not satisfied on the evidence, that either *Robberds* or *Gurner*, if he knew the nature of the arrangement with *Henry*, knew that it was in violation of the will ; and I see no sufficient reason to believe, as to either, that he knew anything at all of the arrangement with the other persons. But, assuming that the defendants had knowledge in each case on both points, we find no authority for holding that they

thereby became responsible—as, at all events, on a constructive trust.

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We cannot approve of solicitors, or any other class of agents, holding, or having trust moneys to their private credit; and, under ordinary circumstances, if such a practice exists, we should not hesitate strongly to condemn the practice. But, in the present case, the act complained of is the withdrawal of trust moneys; and this not in "fraud" of the trust, nor even, except in a mitigated sense, a misappropriation. We are, of course, not defending the act; for it was manifestly the duty of these trustees, *Tompson* and *Elyard*, to see that every loan was on the prescribed security, to wit, a legal mortgage only. We think, however, that it would be too much to hold the partners of one of them liable, as for a breach of trust jointly with him, because merely they did not prevent his withdrawing, or because they were parties to withdrawing, the money, which he had placed in their hands, until they knew that there was such a security; and especially since it does not appear that either the receipt of the money originally by them, or their depositing of it as described, or the act of paying the several sums over to the borrowers resulted (to adopt the language of the bill) in the misappropriation complained of. No decision, we apprehend, has ever gone so far.

If it be said, on the other hand, that still these defendants were agents, and violated their duty as such, the question would arise to whom were they agents? and if in that character responsible to the present plaintiffs, the answer then would clearly seem to be, that the claim is barred by the lapse of time.

The conclusion is, in either view of the matter (but Mr. Justice *Milford* prefers to rest his own judgment on the ground originally taken), that the decree was right; and the appeal, therefore, is dismissed with costs.

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HEALY *against* CORNISH.

June 9.

Injunction to restrain principal from suing surety on certain promissory notes, on the ground that the collateral securities had been destroyed, granted.

THIS was an application for an injunction to restrain *Cornish* from suing *Healy* upon certain promissory notes, which had been endorsed by him.

The circumstances of this case are as follows:—Mr. *Sindon* wishing to purchase some property belonging to a Mr. *Macauly*, agreed to do so for the sum of £7,600, and, in order to procure the funds, borrowed £5,000 from Mr. *Cornish*, who lent it on the security of certain promissory notes made by Mr. *Sindon*, and endorsed by Mr. *Healy*, and a mortgage of certain stock and stations belonging to Mr. *Sindon*. At the time this money was lent, *Macauly* was indebted to Messrs. *Mort and Co.* and the Bank of New South Wales, to the amount of between £4,000 and £5,000, for the payment of which Mr. *Sindon* and Mr. *Healy* were sureties; but inasmuch as Messrs. *Mort* and the Bank were amply secured by *Macauly*, *Healy*, and *Sindon*, would not be called on for payment of those debts. Mr. *Roeburgh* was the solicitor for Mr. *Cornish*, Mr. *Sindon* and Mr. *Macauly*—and he, with their approbation, paid out of the money in his hands originally belonging to Mr. *Cornish*, to the Bank and Messrs. *Mort and Co.*, leaving a small balance in his hands belonging to Mr. *Sindon*.

The mortgage contained a power of sale, enabling the mortgagee, Mr. *Cornish*, to sell in such manner as he thought proper.

Mr. *Sindon* has also mortgaged other stock and stations to Messrs. *Byrne and Co.*, which became vested in Mr. *Cornish*, to secure another sum of money to the mortgagees, so that *Cornish* had a power to sell under the first mortgage, and also a power to sell under the second mortgage. He did not exercise these powers separately according to the terms of the mortgage deeds but together by a sale to Mr. *Davis*, as being likely by that mode of sale to realise more than if the powers of

sale were exercised separately. They realised together about £4600, but it is not possible to say how much the property comprised in the first mortgage realised, and how much that comprised in the second mortgage.

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Gordon for the plaintiff. *Prima facie* the position of the endorser of a promissory note relatively to that of the maker is that of surety. There is no evidence in this case that that position was altered. *Healy* was only surety as to *Macauly's* debt, which was to be paid off. *Healy* was only indirectly benefited by the money advanced; and although the benefit he was to derive from the money might have been his inducement to endorse the notes, it does not alter his position as surety in the absence of any agreement to that effect. *Cornish* must have known that this was one entire transaction, and was bound to use the utmost good faith. The sale was *ultra vires*. The power of sale referred only to the lands mortgaged. It may be that the other lands sold were of inferior value, and so a lower price would be given for the whole than if the more valuable lands had been sold separately. It is not necessary to prove an actual loss; it is enough to shew that there was a change effected in the security by the creditor: *Byles* on Bills (a).

Sir *W. Manning*, Q.C., and *Milford* for the defendant. The money advanced was employed in paying off the joint debts of *Sindon* and *Healy*. *Healy's* liability on the promissory notes is complete and distinct from the mortgage, to which he is not a party. The endorser of a note is liable to the creditor as principal. Even if he were surety, he cannot maintain this suit at the present time, for a surety has no claim on the further security, until he has paid off the whole of the debt for which he is surety. [By the Court. You prevent the surety from ever getting in the securities when he does pay, if you destroy the mortgage.] If the mortgage be destroyed, the surety on paying the debt could compel the creditor to account for it. The relief must be com-

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mensurate with the injury, and the plaintiff does not show that he has suffered any loss by the sale. *Cornish* alleges that the sale could not have been made otherwise, and that there has been no loss whatsoever. The power of sale is ample. A mortgagee may pursue all his remedies at once. The mortgage was for further advances beyond the amount secured by the notes. [By the Court. How can you calculate the amount for which the mortgaged property was sold, if other property was sold with it?] The stations were sold as so many cattle branded in a particular manner, and we can ascertain the cattle running on the station mortgaged by their brand. *Healy* had notice of the dishonouring of the notes before the sale. He knew we were going to sell, and pointed out how many cattle were on the station. *Fisher* on Mortgages (a), *Willes v. Levett* (b), *Dearing v. Earl of Winchelsea* (c), *Rees v. Berrington* (d).

Gordon in reply. If *Healy* is not surety, execution should not issue for the whole amount, as a large portion of the debt has been paid off; if he is surety he must be discharged. The evidence all goes to show that his intention in endorsing the notes was to become surety only. The mortgage recites the notes and *Healy's* endorsement. It was not *Healy's* money that was advanced by *Cornish*—it was *Sindon's*. If *Healy* did endorse the notes as surety, he would be entitled to all further securities given for the debt, even without any agreement to that effect. The only consent we could have given was to realise the mortgage fairly.

June 12.

On this day judgment was delivered.

Mr. *Cornish*, not realising the whole of the debt secured by the first mortgage, brought an action against the plaintiff, Mr. *Healy*, as indorser of the promissory notes. Unless there were some special objection, Mr. *Cornish* had a right to do this—he might enforce all his securities at the same time.

(a) p. 144.

(c) 1 Wh. & Tu. L. C. 68.

(b) 1 De G. & S. 392.

(d) 2 Wh. & Tu. L. C. 814.

The application now made to restrain the action on these promissory notes is founded on this, that the plaintiff indorsed the notes as a surety for the payment of the £5,000 lent by Mr. *Cornish* to Mr. *Sindon*, and that he (*Cornish*), by making the sale in the manner he did released the plaintiff *Healy* from his liability on the notes.

It appears to me that the plaintiff (Mr. *Healy*) was a surety—the nature of the transaction, and the weight of the evidence satisfy me that such was the case. The application of part of the purchase money for *Macauly's* property in payment of debts due by him for which *Sindon* and *Healy* were liable, does not show that *Healy* was in any other position beyond that of a surety. *Sindon* borrowed the money to pay for his purchase. He got *Macauly's* property by means of the borrowed money, the plaintiff *Healy* got nothing—but the money, when in *Macauly's* hands, went to pay off his (*Macauly's*) liabilities. Besides, the evidence as to the actual agreement that *Healy* was to be a surety, convinces me that such was the case.

Healy, then, being a surety, the creditor *Cornish* had no right to deal with any of the securities so as to put him (*Healy*) in a worse position than he would have been if he (*Healy*) had paid off the debt, and the other securities to which he would have become entitled had remained untouched. No doubt *Cornish* might have exercised the power of sale contained in the first mortgage (if the power were not exceeded) without releasing *Healy* from his liability, but the sale of the property comprised in the first mortgage was not made in conformity with the power given, and, therefore, the security which *Healy* would have been entitled to if he had paid off the debt, was improperly and illegally taken away from him. *Cornish* had no right to mix up other property with the property comprised in the first mortgage or to sell them together, so that it could not be known how much the latter property produced, and it may be that such a mode of sale would produce less than

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a sale of the property by itself, at all events the surety had a right to assent to or dissent from any such a mode of sale. If he did not assent his security would be improperly dealt with.

It appears to me that the sale having been made in the way I have stated, without the assent of *Healy* (for certainly no such assent is proved), he is released from his liability on the notes, and I must grant the injunction asked for. The costs of this motion will be plaintiff's costs in the cause.

June 21.

RATTRAY *against* BLANCHARD.

Demurrer for multifariousness under the circumstances overruled.

THIS was a demurrer for multifariousness by *George Allen* and *Allen Bowden* and *Allen*, defendants, added to the plaintiff's amended bill.

The facts of this case are set forth *supra (a)*. The plaintiff in his amended bill charged that the defendants, *G. Allen* and *Allen Bowden* and *Allen*, claimed some interest in the premises other than that of the defendant *Blanchard*—the nature and particulars of which they refused to discover, and prayed for a discovery thereof, and for the delivery of all the title deeds.

Milford in support of the demurrer. The plaintiff by his amended bill demands several matters of different natures of several defendants. If the allegation, that the defendants claimed under a distinct right, were omitted, the bill would still be demurrable, for they could then only hold the deeds as agents. [*By the Court.* If a trustee should part with his estate and retain the title deeds, would he not be a proper party to a suit relating to that estate? The deeds are part of the property.] There is nothing to show how these deeds came into our hands. Our title may be paramount to that of the other parties. The plaintiff claims under a purchase of the assets of the insolvent estate of *Hughes* and *Hoskings*; *Mitford on Pleading (b)*, *Plum v. Plum (c)*, *Attorney General v. Goldsmiths Company (d)*.

(a) p. 1.
(c) 4 Y. & C., 345.

(b) p. 209.
(d) 5 Sim. 676.

Gordon for the plaintiffs. The defendants assume the very fact we want to ascertain. It may be that when the defendants set out the deeds, the bill will be found to be demurrable, but that cannot now be ascertained. The bill shews that they claim some interest in the subject matter of the suit, which they refuse to discover. We claim one general right as against a variety of opposing claims. The defendant may not deduce from an allegation in the bill an inference not included in it; *Mitford* on Pleading (a), *Salvidge v. Hyde* (b), *Attorney General v. Parr* (c), *Barber v. Barber* (d), *Pauncefoot v. Hankay* (e), *Campbell v. Mackay* (f).

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Milford in reply. If these parties had purchased under *Hughes* and *Hoskings* for value, the bill would be clearly demurrable, and would not fall within the cases cited. It would be an interest totally distinct from that of the other defendants. In *Campbell v. Mackay* (g) the prayer was the same against all the defendants; here, a declaration of trusteeship and account is prayed against the other defendants, and against us only the discovery and delivery of the deeds; *Bignold v. Arnold* (h).

The PRIMARY JUDGE. The cases cited as to what constitutes multifariousness are very conflicting, and the Court seems to have looked to the circumstances of each case in order to ascertain whether the balance of convenience was in favor of or against the bill as framed. I do not see in this case that the parties who demur suffer any inconvenience in being joined with the original defendants in this suit, and the two matters seem in some sort to be connected. I must therefore overrule this demurrer with costs.

(a) p. 209.
(c) 6 Jur. 245, p. 248.
(e) 7 Jur. N. S. 929.
(g) *Supra*.

(b) 5 Madd. 138, p. 146.
(d) 29 L. J. Ch. 49.
(f) 1 M. & Cr. 603, 618.
(h) 11 Sim. 24.

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June 14, 17, 21.

JONES *against* WALKER.

Injunction granted to restrain creditor, whose debt was secured by certain promissory notes and a mortgage, from suing upon one of the notes, on the ground that he had assigned the mortgage and was not in a position to reconvey the mortgaged property.

Stephen, C. J., dissentient on appeal.

THIS was a motion to dissolve an *ex parte* injunction, to restrain the defendant from suing the plaintiff on a certain promissory note. The bill was filed by *Auber George Jones against Thomas Walker and Ralph Meyer Robey*, under the following circumstances:—In the month of November, 1861, *Jones* and *Robey* entered into partnership in respect of certain sheep stations called Gobbagumblin and Tooyal, for a period of five years, and *Jones* agreed to pay *Robey* the sum of £8,148 13s. 4d. by his promissory notes, at 6, 12, 18, and 24 months, dated the 17th October, 1861, and secured by a mortgage of the share of *Jones* in the partnership property. The notes were accordingly given; and in the month of January, 1862, an alteration was made as to the time of payment and the amount of some of the promissory notes. *Walker* endorsed some of the notes; the first of which remained in *Robey's* hands, and the second fell due on the 20th day of October, 1863; the remaining notes did not fall due until the 20th day of April, 1864, and the 20th day of October, 1864. On the 14th day of April, 1862, *Jones* gave to *Robey* the mortgage over his share of the stations, according to the agreement. On the 11th day of February, 1862, *Robey* gave to *Walker* a mortgage over certain lands at Petersham, in consideration of *Walker* discounting the said notes and to secure further advances. On the 24th day of April, 1862, *Robey*, by an endorsement on the said indenture of mortgage of the 14th day of April, transferred the said mortgage to *Walker*, in consideration of *Walker* discounting the four promissory notes then current and secured by the within mortgage; this was done without the knowledge of *Jones*.

On the 12th day of September, 1862, *Jones* and *Robey* dissolved partnership, in consideration of *Jones* giving to *Robey* £1,000, and *Robey* delivering up the promissory

notes to be cancelled. There was no proof that this transaction was within the knowledge of *Walker*. The notes never were given up, and *Robey* assured *Jones* that they had already been cancelled. On the 24th day of September, 1862, *Walker*, in consideration of £4,000, assigned to *Robey* all his interest in the said indenture of mortgage of the 14th day of April, 1862, discharged from the payment of the several promissory notes held by him and the moneys thereby secured, subject to any equity of redemption subsisting therein (if any) on the part of *Jones*, but without prejudice to any other remedy or security of *Walker* for any of the said promissory notes remaining in his hands unretired and unsatisfied. *Walker* commenced an action at law against *Jones* on the promissory note, which fell due on the 20th day of October, 1863, as the maker thereof.

The bill prayed that the promissory notes then in the hands of *Walker* might be delivered up to be cancelled—that *Walker* might be restrained from proceeding in his action at law—that if necessary an account might be taken of what was due on the said four notes, and that on taking such accounts *Jones* might be credited with the £4,000 paid by *Walker* to *Robey*, and with the difference between the actual value of the mortgaged property and the said sum of £4,000—and that if any sum were found due by *Jones*, he might be reimbursed out of the securities given by *Robey* to *Walker* by the deed of the 11th day of February, 1862.

Stephen and *Darley* for the defendants. *Jones* is primarily liable upon these promissory notes as the maker; *Robey* was only the endorser. The mortgage was only a collateral security for the payment of the notes. There are no conflicting rights between *Jones* and *Walker*, and the only effect of not giving notice to *Jones* of the assignment of the mortgage would be that *Jones* could have paid off the mortgage to the original mortgagee, and so rendered it valueless in the hands of the assignee. *Jones*, on selling his share to *Robey*, did not take the precaution to get the notes delivered up to him, or to see them cancelled.

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He cannot complain of that transaction to us. The release to *Robey* of *Jones'* equity of redemption destroyed the mortgage so far as *Jones* was concerned. No doubt *Robey* could not sue on these notes now, but *Walker's* rights upon them are unaffected. *Robey* having got a release of the equity of redemption, wanted to get back in his own hands all his property free from incumbrances, and accordingly got the mortgage back from *Walker*. What is there to prevent a creditor, who holds two securities, giving back one, and remaining satisfied with the other? A release of one of two securities, is not a release of the debt. No payment will discharge *Jones*, except payment of the notes at maturity. *Robey* and *Jones* could, as between themselves, agree to cancel the notes, but not so as in any way to affect the position of *Walker*; *Coote on Mortgages* (a), *Jones v. Broadhurst* (b).

The *Attorney General* and *Milford* for the plaintiff. *Jones* on payment of the promissory notes would be entitled to the benefit of all the other collateral securities; and as *Walker* has put it out of his power to restore these securities, he cannot sue on these notes. The notes are not themselves payment of the purchase money, they are merely securities for its payment. The moment the notes are paid the mortgage becomes valueless. The assignment of the security is the assignment of the debt. The Court will not allow the securities given for one debt to be scattered about among different persons; they must be kept together, so that the debtor, on payment of any one of them, will be enabled to get the others back; otherwise the debtor would be harassed by a multiplicity of suits. 2 *Spence's Equity Jurisprudence* (c), *Lockhart v. Hardy* (d), *Schoole v. Sall* (e), *Bailey v. Willis* (f), *Perry v. Barker* (g), *Tooth v. Hartley* (h), *Shelstabene v. Harrop* (i), *Ex parte Monro* in the matter of *Frazer* (k), *Jones v. Gibbons* (l), *Harris v. Harris* (m).

(a) p. 301-4. (b) 9 C. B. 173. (c) ps. 614-5-6, 682-3.
 (d) 9 Beav. 356. (e) 1 Sch. & Lef. 176. (f) 2 Hare 1.
 (g) 8 Ves. 527; S. C., 13 Ves. 198. (h) cited in Ves.
 (i) 6 Madd. 39. (k) *Buck's Bankruptcy Cases*, Vol. I., p. 300.
 (l) 9 Ves. 410. (m) 3 Jur. N. S. 504.

Stephen in reply. The case of *Lockhart v. Hardy* does not apply to the circumstances of this case. There the opening of the foreclosure was prevented by a sale of the property to a third person. If *Jones* had not contracted to sell his equity of redemption to *Robey*, he could have got back his mortgage from him. The payment of the notes to *Walker* is in fact payment to the order of *Robey*. *Jones*, by not seeing that the notes had been cancelled before he conveyed his equity of redemption, had enabled *Robey* to deal with them, and has by his own act brought about the very state of circumstances he complains of. Promissory notes are in their nature negotiable, and the parties must have contracted at the first with a knowledge that these notes would be negotiated, and that the mortgage could not be assigned with each note. *Walker* re-conveyed the mortgage subject to *Jones'* equity of redemption, if any, and expressly reserved to himself the right to sue upon the notes. The principle, that the assignment of the security is the assignment of the debt, cannot apply where the securities are negotiable instruments and a mortgage. The holder of the notes has a distinct legal right upon them apart from the mortgage. *Jones* is not now in a position to ask to have the mortgage re-conveyed to him, as he has parted with his equity of redemption; had he not done so, he could have redeemed the land from *Robey* on payment of the notes, but in no case could he get it back without such payment. If this injunction is not set aside, *Jones* will have escaped all liability to pay these notes, simply because *Walker* was satisfied with the security of the notes, and did not require the further security of the mortgage. At any rate *Jones* ought to pay the money into Court. If the £4,000 had been paid on account of the notes, it could be pleaded in the action; but it is clear that that sum was intended to cover further advances made, and other debts owing by *Robey*. If *Walker*, having received the £4,000 and recovered on all the notes, have ultimately received more than he was entitled to, he would

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be a trustee of the surplus for *Robey*, not for *Jones*.
Willes v. Levett (a), Copas v. Middleton (b).

On this day, judgment was delivered by the PRIMARY JUDGE.

The better way to consider this case is to look at the different positions which the parties held from time to time from the commencement of their transactions—from the purchase of one-third of *Robey's* interest of the stations of Gobbagumblin and Tooyal by the plaintiff—to the termination of them by the institution of this suit. The first proceeding took place on the 28th of November, 1861, whereby a partnership was contracted between the plaintiff and *Robey* in the Tooyal and Gobbagumblin stations, on the terms that the plaintiff should pay to *Robey* the sum of £8,148 13s. 4d. by his four promissory notes, at 6, 12, 18, and 24 months, with interest, the notes to be dated the 17th of October, 1861, and to be secured by a mortgage of the plaintiff's share in the partnership property.

The notes were given accordingly, but the mortgage stipulated for was not executed till the 14th April, 1862.

In the meantime an alteration was agreed upon with respect to the times of payment and amounts of the promissory notes, but otherwise the agreement for the partnership was not altered.

It appears that the mortgage contained a power of sale, but inasmuch as the condition on which it was to be exercised did not arise, it is immaterial. The power was to sell on non-payment of the notes, but none were due when it is supposed to have been exercised.

Now, what was the position of the plaintiff and *Robey* at this time? Plainly, that of a creditor having two securities for the payment of a sum of money, to become due by the debtor, for the sum of £8,148 13s. 4d., which was the consideration for the admission into the partnership. Under these circumstances, *Robey* could not deal with the mortgage, so as to prevent the plaintiff from claiming the property contained in it, if

he should pay off the promissory notes as they became due. If he had done so, he would not be allowed to enforce payment of the promissory notes till he should be in a position to re-convey the property to the plaintiff, when the notes should be discharged; but I apprehend if he should place himself in that position, whatever he might have done with the property in the meantime, he would not be restrained from proceeding on the notes. He must, however, have placed himself exactly in the position he was in at the time the mortgage was made; the property mortgaged must not be altered or affected by any equities, or the plaintiff be placed under any difficulties arising from such dealings with the mortgage. The rule relating to a surety by which he is released, if at any time the surety could not demand with effect the collateral security though no injury were done, is so highly technical that I apprehend it would not be imported into the case of a mortgagee having a collateral security. It would be sufficient for the mortgagee to be able to pay the debt when it became due.

The next step in these transactions is that on the 11th of February, 1862, an indenture was made between *Robey* and the defendant, which, after reciting that it had been agreed that the plaintiff should discount these notes, secured by the mortgage from the plaintiff to *Robey*, and if he should make further advances to *Robey*, the land thereby conveyed should be a further security for such payment and advances. It conveyed to the defendant a piece of land situate at Petersham for that purpose.

Now this deed made no alteration in the plaintiff's position—it merely gave the defendant a further security, in case the security intended to be assigned should not be sufficient. The plaintiff had nothing to do with it, nor was he prejudiced in any way. On the 20th of April, 1862, the first of the plaintiff's notes became due, and was not paid; and on the 24th of the same month, *Robey*, in consideration of the discounting of the four promissory notes not then due, transferred the mortgage to the defendant without the knowledge of

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the plaintiff. Now, by doing this, the plaintiff was clearly prevented from obtaining the mortgage from *Robey* if he had paid the notes, but he could have obtained it from the defendant, who, by discounting the notes and taking this assignment, became an assignee of the securities. It is not clear what became of the other note which remained in *Robey's* hands, but as it was not included amongst those discounted it probably was paid; but, at all events, the plaintiff does not state that it remained unpaid during the time the transactions took place after it became due. If paid then, the defendant became a complete assignee of the notes which remained due, and of the mortgage which was a security for them and for them only. The defendant was in the position of *Robey*. He had no right to deal with the mortgage any more than *Robey* had, so as to prevent the plaintiff obtaining the property comprised in it if he should pay the promissory notes.

On the 12th of September, 1862, *Robey* and the plaintiff, without the knowledge of the defendant (for I am opinion that Mr. *Napier*, the agent of the defendant, is not proved to have had such knowledge, either at that time or at any subsequent time, and the defendant himself was not in the colony), entered into an agreement dissolving the partnership in consideration of the plaintiff paying £1,000 to *Robey*, and *Robey's* delivering up unpaid promissory notes.

The notes were not delivered up, for they were in the defendant's hands, and the plaintiff appears to have been satisfied by the assurance of *Robey* that they had been cancelled.

This deed could not affect the defendant, for he then held the notes and mortgage as assignee for valuable consideration. *Robey* had no right over the notes or mortgage, and could not deal with the plaintiff in respect of them.

It does not appear whether the defendant ever gave notice to the plaintiff of the assignment of the debt and securities by *Robey* to him. If, however, the absence of that fact is necessary to make out the plaintiff's claim,

he should have alleged and proved that no such notice was given.

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I must therefore, for the present purpose, presume that the defendant gave the plaintiff notice of the assignment by *Robey* to him, and if so then clearly the plaintiff could take no benefit under this deed of the 12th of September, neither could the defendant's position be prejudiced by it, nor could he benefit by it unless he gave effect to it, which of course he would not do.

The defendant then standing in the same position as *Robey* originally did, he, on the 24th of September, 1862, in consideration of £4,000, assigned to *Robey* all his interest in the original mortgage made by plaintiff to him (*Robey*), and the property comprised therein discharged from the payment of the notes held by him, and the money thereby secured, subject to any equity of redemption subsisting therein, if any, on the part of the plaintiff, but without prejudice to any other remedy or security for the defendant for any of the notes remaining in his hands.

The defendant having put himself in the place of the original mortgagee, he has no right to do an action which will prevent him (having become the owner of the security, both notes and mortgage) from delivering up the mortgage if the notes are paid. Suppose the plaintiff were to meet the notes as they become due, how could the defendant convey the property comprised in the mortgage to the plaintiff? It is to him that the plaintiff is to look for a conveyance, not to *Robey*, for the notes are payable to him. He is the assignee both of the notes and the mortgage, for the defendant has never transferred the notes to *Robey*. What has become of the mortgaged property does not further appear. There is, however, a peculiarity in this case. The plaintiff would not be entitled to a conveyance of the property comprised in the mortgage if the note now due were paid either voluntarily or by process of law, for there are other notes still unpaid, and which the plaintiff cannot insist on paying off till they become due. He is not, nor would, if execution

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in the action went against him, be in a position to demand a conveyance of the property comprised in the mortgage. It probably would be insufficient if, when the last note were paid, the defendant were in a position to re-convey the property to the plaintiff. It does not, however, appear to me that I can look as to what may happen when the last note becomes due. The rule appears to be that the Court will not allow the mortgagee to proceed on his collateral securities when he has put it out of his power to re-convey the mortgaged property; *Lockhart v. Hardy* (a).

What would be the effect if the defendant were to become again possessed of the property sold I need not decide. See *Perry v. Barker* (b). But at present the injunction must be continued. The costs of this action paid by defendant to plaintiff.

June 28, 29.
September 20. The defendants appealed to the full Court from the judgment of the PRIMARY JUDGE.

Stephen and Darley for the defendants.

The Attorney General and Milford for the plaintiff.

The arguments and cases cited were in substance the same as before the Court below.

Sir A. STEPHEN, C. J. This is an appeal by the defendant against an order of the Primary Judge for an injunction, restraining him from proceeding against *Jones*, in an action on a promissory note, made by the latter in favour of one *Robey*, and by him indorsed to the defendant.

There is some apparent complication in the case, but the only important facts are the following:—*Robey*, being the owner of certain extensive sheep or cattle stations with the stock thereon, agreed to admit *Jones* into partnership, and convey to him an undivided share in the property, in consideration of a large sum payable by the latter's promissory notes. That agreement was

(a) 9 Beav. 849.

(b) 8 Ves. 531.

carried out, and the notes (or others, varied in amount and times of payment, in lieu of them) were given—of which the note at present sued upon is one; *Robey* protecting himself, in case of their dishonour, by a mortgage on the share in question, executed by *Jones*. Shortly afterwards, *Robey* indorsed three of those promissory notes to the defendant, who discounted them for him; and, as security for their payment, and the payment of any other advances which *Robey* might require, the latter mortgaged to the defendant some land at Petersham, and also assigned to him *Jones'* mortgage. What was done by *Robey* with the other notes I am unable to discover; but not one of them, so far as I collect, has been paid. Of the three discounted by the defendant, being at twelve, eighteen, and twenty-four months' date, respectively, the only one due when the action was commenced is the note sued on—the others not having then arrived at maturity.

Within a few months after the discounting, it seems, the defendant went to England; and his agent, on his behalf, in consideration of four thousand pounds paid by *Robey* in reduction of the latter's debt (including, it would seem, the amount of the notes, as well as that of other advances), re-assigned to *Robey* the plaintiff's mortgage, and the property comprised therein, discharged from the payment of the notes—but, as the deed in terms stipulates, without prejudice to *Walker's* right to sue on them, and subject to any equity of redemption subsisting in *Jones*, if any.

It has been subsequently discovered, as I collect from the bill, that this arrangement was probably entered into as a necessity on *Robey's* part, in order to enable him to carry out one then recently before made with the plaintiff (in fact only a few days previous, but unknown to *Walker* or his agent), for the re-purchase by *Robey* of *Jones'* share, in consideration of one thousand pounds paid to the latter—who was also, of course, to have thereupon his several promissory notes returned to him. As to the three remaining with *Walker*, however, it is clear that they were never returned; and the

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plaintiff swears, not only that he was ignorant of the fact of their endorsement, and of *Walker's* having at any time an interest in the property, but that *Robey* assured him (*Jones*) that the notes were actually then all cancelled. *Robey* is dead, and no explanation on his part, therefore, as to that assertion, is now possible. What has become of or been done with the stock or stations since, does not at present appear. Inasmuch, however, as the plaintiff re-sold (and consequently I presume re-conveyed) his share or interest in them, whatever that interest was, back to *Robey*, the latter thereby became enabled to deal with them as exclusively his own, and the probability is that he did afterwards so deal with them.

The question is, whether these circumstances or any of them preclude the defendant in this suit from recovering, at law, on the note or notes referred to; and I am of opinion that they do not. If the four thousand pounds received by his agent, in consideration of which the latter released *Jones'* mortgage, be placed against the amount of the notes alone, more than one of them will have been satisfied; but this is not the point now in contest. It may be, moreover, that *Robey* was indebted to *Walker* in a much larger sum, on account of his other advances—against which, perhaps, chiefly, if not exclusively, the money was credited. The plaintiff rests his case on another ground. He contends, and my learned colleague has decided that, as the defendant is not now, and doubtless never will be, in a position to return the mortgaged property to *Jones*, but parted with it to one who at the time must be deemed a stranger, no action on any promissory note to secure which it was mortgaged is maintainable by the defendant. The principle is relied upon, that a mortgagor cannot alienate his security away from the debt; but that, where the latter is, in the same hands the security for it must be—and so, in effect, that the re-assignment by *Walker* passed necessarily the debt, as incident to the mortgage.

It is not my intention to dispute this general principle or to examine the numerous cases in which it has been acted on. Conceding the principle as between mortgagor

and mortgagee, and transferees from the latter, in ordinary cases, I cannot perceive its applicability to one so peculiar in all its circumstances as the present. In the first place, here is a mortgage to secure the payment of negotiable instruments; and the principle, therefore, it is certain, cannot wholly apply. *Robey* might have effectually indorsed all the promissory notes to several parties, or to one—and, in each case, without assigning the mortgage; or he might have assigned that security to one indorsee alone, who, it is admitted, could convey to a second indorsee of the same note, without notice of the mortgage, an indefeasible title to sue upon the indorsed instrument. The debt, consequently, and the mortgage security, are in the very nature of the transaction divisible—and, we may reasonably infer, were intended by both the original parties to have been so, with all the consequences attaching to such a state of things, from the outset.

Nor is this the case of an ordinary mortgage in other respects. Should any one of these negotiable notes be dishonoured, in the hands, at all events, of a holder ignorant of that security, the maker could confessedly be sued upon it—although the mortgage might remain with the original payee, or have been assigned to the holder of some other of these instruments. But, moreover, there was a power of sale in the deed, on the non-payment of any of the notes; while, on the other hand, the security was to be wholly void on their due payment. It seems to me to follow, that such power would be exercisable at the instance of any person interested in enforcing payment of a dishonoured note. If *Robey*, for instance, had been called on (or were his executors now called on) to meet any such note, there would exist the right I conceive to act on that power, in order to realise the required amount.

But since *Robey* might certainly at any time, by the dishonour of one of the notes in the hands of an indorsee, become himself a sued debtor, and there would be no time at which—while they were outstanding—he would not be liable as indorser upon them, and so be

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interested in preserving that power of sale for his own protection, it can scarcely be said that a re-assignment to him, although not at that moment their holder, was in any fair sense a transfer of the security to a stranger, or within the rule respecting the assignment by mortgagees of their securities, supposing this to be a case in which the principle itself that has been stated is applicable.

Assuming the principle, however, to apply to a mortgage and debt of the kind described, its foundation is this—that the mortgagor, having conveyed his estate as a pledge only, is entitled to have it back again from his creditor, so soon as the specified debt shall have been paid. Now, with great deference to my brethren, both of whom think differently, it appears to me that the plaintiff here has not, and at the time of the re-conveyance to *Robey* had not, any such right—and so, that the ground of the rule relied on wholly fails. The bill itself admits, that, in consideration of a thousand pounds paid or to be paid by *Robey*, and of the return or promised return by the latter of the promissory notes in question, the plaintiff gave up (in other words sold, and therefore I presume duly re-conveyed to him) the share or partnership interest, for which those notes were given. For what purpose could this sale and transfer of the property have been, or with what inducement on *Robey's* part, but that the latter should thereby become again solely its owner, and be enabled to deal with it accordingly as he might think proper? But, at the time of that contract, the mortgage was vested in *Walker*; and a re-assignment of it by him to *Robey*, therefore, became necessary. True, this was for *Robey's* benefit—since, without the transfer, he could not have conveyed a title to any one dealing with him. But it was for *Jones'* own benefit, also; because he thereby was enabled, although all unconscious in whose hands the security lay, to carry out the arrangement on his part, receiving thereupon the stipulated bonus, and only not receiving back the discounted notes, because of his own culpable remissness and negligence.

The assignment of the mortgage to *Walker*, it appears (the instrument or a copy of it having by consent been laid before us), was indorsed on the deed. *Walker's* re-assignment was indorsed thereon in like manner. But the plaintiff, according to his own account, conveyed away all his interest without either insisting on the production of the outstanding notes, or, it is equally clear, an inspection of his own mortgage—the indorsements on which would, at once, have disclosed the fact of *Walker's* title. The re-assignment was, as already mentioned, a conveyance of the property free from claim on it in respect of the notes; but all right of redemption in *Jones*, if any, was preserved—so that, in case of such right being asserted, he would have been enabled to maintain it without reference to them.

How then can this plaintiff establish his right—on payment, or subject to the payment of the notes in question—to get back the stock and stations thus dealt with? He himself transferred his interest in them to *Robey*; and the latter, if he has since conveyed them to other persons, was enabled to do so by the plaintiff's own deliberate act, very probably by joining in the conveying instrument. The transaction between him and *Robey* was one of absolute sale, intentionally so; and *Walker's* agent, in abandoning all claim on the property, and surrendering the assignment accordingly, did no more, although not aware of the facts or the object, than assist in carrying the arrangement into effect.

But *Robey*, it is objected, was bound to have restored the notes; the consideration to *Jones*, therefore, has as to the greater part failed; and *Walker*, by his agent's act has enabled *Robey* to perpetrate that wrong upon him. As the evidence now stands, we must take it that the facts are so. Does it follow, however, that the plaintiff is to be adjudged in this suit,—as against the defendant, an innocent person in that matter,—entitled to get back the property thus improvidently conveyed? I do not think so. The plaintiff's lien or claim on the property, if still in *Robey's* hands, would be, not that of a mortgagor, claiming the estate or a share therein on payment of the notes in question, but that of a vendor

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of all his interest, defrauded of the larger portion of the price. That is the plaintiff's real complaint, in effect—not that the estate was put back again into *Robey's* hands, whereby he was enabled to effect their then common object, but that, under circumstances, the particulars of which we can now never know, *Robey* failed to carry out his contract as to the notes. For this, any more than for the re-assignment itself, although practically a fraud on the plaintiff, or that which enabled *Robey* to commit one, the defendant cannot in my opinion, under the circumstances of the case, be held responsible.

If, however, we put *Jones'* absolute sale to *Robey* out of the question, and consider the plaintiff still as simply a mortgagor entitled to redeem the property—then I say that he has that right of redemption now, at this moment, by virtue of *Walker's* re-assignment, without paying the notes or any of them. Consequently, as it appears to me, the plaintiff was not injured by that transfer; and all ground of complaint, therefore, against either the defendant or *Robey*, in respect of the act, fails.

My learned colleagues, however, being of opinion with the respondent, the defendant's appeal is dismissed with costs; for the reasons already assigned by their Honors on the hearing of the appeal, and by Mr. Justice *Milford* on pronouncing his original order.

It may be well to mention, for the sake of strict accuracy, though the variance is not of the slightest moment, that the defendant discounted in fact four of the plaintiff's notes; two being two of those originally given, and the other two being the amount (with some variation) of the third original note, divided.

MILFORD, J. I have not heard anything on the argument of this appeal which has induced me to alter my opinion as to the propriety of the order I made on the motion for an injunction before me—viz., that it should be continued till the hearing of this cause, when the equities, whatever they may be, can be arranged between the parties. It is desirable, however, that I should notice some of the arguments urged for the appellants.

The facts appear on my former judgment.

It is admitted that the case of *Lockhart v. Hardy* (a) is good law, but it is sought to distinguish the present case from that on several grounds.

The principle of that case is, that a mortgagee should be in a condition to return the mortgaged property in *statu quo ante* when paid the debt, and that if he cannot do this, he will not be allowed to proceed for the debt upon any other security he may have. This principle involves another, that in whose hands soever the debt is, there all the securities must likewise be, that a mortgagee will not be allowed to alienate the securities away from the debt.

First, it is contended that when the plaintiff and *Robey* originally entered into the arrangement by which the notes and the mortgage were to be given by the plaintiff to *Robey*, he must have known, from the general usage of persons giving securities on stock and stations, that the promissory notes then given would be put in circulation without the mortgage being at the same time assigned, and that, therefore, he cannot complain of this not having been done. A conclusive answer is that there is no evidence of any such general usage, and the general rule applies, that parties entering into a contract, enter into it with a knowledge of the law, and, therefore, both the plaintiff and *Robey* must be taken to have had a knowledge of the case of *Lockhart v. Hardy*, and that the principle there laid down is the law.

That principle, however, is subject to this, that the promissory notes, if put in circulation (which, if done, is done contrary to the duty of the mortgagee, unless he at the same time assign the mortgage) and taken by a person for valid consideration without notice that this has been done, can be enforced against the drawer. If taken by a person having notice of the mortgage, he would be entitled to have the mortgage assigned, and if he should neglect to do so, he would put it in the power of the mortgagee to deal with the mortgage illegally, and cannot complain if, in consequence of the mortgagee so

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dealing with it, he is prevented from suing on the notes.

In the present case, the mortgagee (*Robey*) assigned the debt and securities to *Walker*, who thereupon was in the same position as *Robey* had been.

But then it is said that the deed I have called a mortgage is not a mortgage but a trust deed, and therefore not within the principle of the case of *Lockhart v. Hardy*. I cannot think so. Even if this were a trust deed, the principle extends to such a deed and to securities generally; and whether the land, stock, or stations, are given as a security by means of a trust deed or mortgage in the strict sense of the word, there is no difference. When the debt is paid, the securities must be given up uninjured by the mortgagee. The promissory notes, bond, or covenant, if any, and all the title deeds, must be returned to the mortgagor.

It is then said that, admitting *Walker* to stand in the place of *Robey* after the assignment to him, the transaction between *Jones* and *Robey*, whereby the partnership between them was agreed to be dissolved upon payment of £1,000 by *Robey* to *Jones*, the delivery of the notes to *Jones* by *Robey*, and the one-third of the stock and stations belonging to *Jones* given up to *Robey*, prevents *Jones* now obtaining this injunction—he having conveyed away the equity of redemption to *Robey*. *Robey* would have obtained, if the agreement had been carried out, not an equity of redemption, but the whole interest in one-third of the stock and stations. What *Jones* intended to obtain by that agreement was a discharge from the debt, and £1,000 in consideration of his giving up his interest in the stock and stations; but he never got such discharge, and as between him and *Robey* the stock and stations could never have been claimed by *Robey*. The whole matter rested on agreement, except that the £1,000 had been paid by *Robey*. The transaction was clearly fraudulent on *Robey's* part; as represented in the plaintiff's affidavit he had not the notes, nor could he get them, and when, according to the agreement, he was to give them up, he stated that he had them in his possession cancelled. Under these circumstances *Robey*

could never have claimed the stock and stations as against *Jones*. This being so, *Walker* or his agent either knew of the transaction or not. I will take it for granted that he did not, for I do not find any proof that he had such notice. As, therefore, he knew nothing of it, as far as he is concerned his position is not altered. *Jones* had, before it took place, the equity of redemption; he had a duty and right to pay off the mortgage, so after the transaction he is in the same position. Whatever act done before would have injured *Jones*, the same act done afterwards would have injured him. If *Walker* had no right to part with the mortgage before that transaction, so as to injure *Jones*, he had no right to part with it after.

It is *Jones* who has the right to call upon *Walker* for a conveyance on payment of the debt, not *Robey*, who in equity cannot take anything under the agreement between him and *Jones*. *Robey* could not redeem the mortgage, *Jones* could.

Walker then without the knowledge of *Jones* assigns either the absolute interest in the one-third of the stock and stations, or his interest in them as mortgagee (it is quite immaterial which, and whether we call the original deed a mortgage or trust deed) to *Robey*, who, as the equity of redemption was not in him, must be taken to be a mere stranger. Then how is *Jones*, when he pays the money to *Walker*, to get back the stock and stations? He never sanctioned their transfer to *Robey*, nor did he do any act which by possibility could lead *Walker* to do so, for *Walker* was ignorant of what had taken place between *Jones* and *Robey*.

Walker, therefore, has put it out of his power to convey the one-third of the stock and stations, and, unless he gets them back so as to enable him to do so, he ought not to be allowed to proceed with this action till the hearing of the cause. What may be the decree, of course, I cannot now say, as further evidence may be given.

A question was raised whether the injunction should go, if at all, without the amount of the promissory note, for which the action is brought, being paid into Court

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by *Jones*. It seems to me that when the cause comes on for hearing, in all probability the decree will establish either that the plaintiff cannot be sued on the notes at all, or that he cannot be sued on the note upon which the action is brought, by reason that *Walker* has received £4,000 by sale of the one-third stock and stations pledged to him. If no other evidence than that now before the Court were before it at the hearing, the decree would be either that *Walker* could not proceed at all, or at least not till the notes to the amount of £4,000 were taken up by *Walker*, probably the former would be the decree, but that is immaterial at present. This of course is only a supposition of what the decree may be; and if either of such decrees should be made, it would be doing an injustice to *Jones* to make him now pay this money into Court, or in default that the amount should be levied upon him by execution in the action. *Walker* has to my mind done wrong to *Jones* by the transaction with *Robey*, and therefore ought not to call on him to pay the money into Court.

I am desired to add for Mr. Justice *Wise* that he concurs in this judgment, and for the reasons I have given.

June 24.
August 10, 12,
16, 17, 19.

Bill for re-
demption.

Bill for re-
demption
charged that
the consid-
eration in the

deeds was not
paid at the
execution of
the deeds, nor
so large a sum
ever paid;
and prayed,
beside usual
accounts, an
account of all
monies paid
by the de-
fendants.

Answer set up special agreements as to the consideration to be inserted in the deeds. Held, that agreements were proved and could not be set aside in this suit.

BROUGHTON *against* RODD.

THIS was a bill filed by *Thomas Broughton* against *John Savery Rodd*, *Thomas Gregan*, and *George William Graham*, for the redemption of certain properties mortgaged to them by one *Charles Hutchinson Roberts*.

The bill set forth the mortgage to *Rodd*, dated the 24th day of September, 1858; the mortgage to *Gregan*, dated the 29th day of January, 1859, to secure the repayment of the sum of £1,500 and further advances; and the mortgage to *Graham*, dated the 16th day of April, 1859, to secure the repayment of the sum of £2,400 after payment of the prior mortgages.

The bill charged that the respective sums of £1,500 and £2,400, mentioned as the consideration money in the indentures of mortgage of the 29th day of January, 1859, and the 16th day of April, 1859, respectively, were not in fact paid on the execution of the said indentures, nor had such large sums ever been paid; and that the defendants, *Gregan* and *Graham*, had received large sums of money in liquidation of their respective mortgages.

On the 11th day of October, 1861, the estate of *Roberts* was sequestrated; and on the 10th day of July, 1862, the plaintiff purchased the assets of *Roberts*' estate.

The bill prayed for an account of what was due to the several defendants for principal and interest on their respective mortgages, and of rents and monies received by them respectively, under and by virtue of their mortgages; for an account of all sums of money advanced by the defendants, *Gregan* and *Graham*, or either of them, to, for, or on account of the said *C. H. Roberts*, and of all sums of money paid to *Roberts* by *Gregan* and *Graham*, under and in respect of the indenture of the 16th day of April, 1859; for payment of the sums found due, and a re-conveyance of the properties mortgaged.

The defendant, *Gregan*, by his answer, admitted that the sum of £1,500 was not paid at the date of the execution of the indenture of mortgage of the 29th day of January, 1859, but said that that mortgage was given by *Roberts* to secure debts to the amount of £1,500 then due to him by *Roberts*, and that he had since the execution of the indenture advanced sums amounting to £574 and upwards.

With respect to the indenture of mortgage of the 16th day of April, 1859, both the defendants, *Gregan* and *Graham*, stated, that a short time prior to the execution of that indenture, *Roberts* had represented himself as indebted to various creditors to the extent of £2,400, and had asked them to settle with them, and that he would give them a mortgage over this property for the full amount of the £2,400, and that if they could compro-

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mise with the creditors for a smaller sum, the balance (if any) was to be a bonus to them for the risk and trouble they took, and should remain on the security of the mortgage.

June 24. On this day the cause came on for a hearing upon a motion for a decree. The only evidence offered was an affidavit of the plaintiff, echoing the bill, but swearing only according to his information and belief, and the answers of the defendants.

Milford for the plaintiff. There should be a reference to the Master to ascertain the amounts actually advanced under these mortgages, and then an account on the footing of the amount so found.

Owen for the defendant *Gregan*.

Broadhurst, Q. C., for the defendant *Graham*. There is no case made by the pleadings to induce the Court to set aside these deeds *pro tanto*, for such would be the effect of the decree asked by the plaintiff. There is simply a charge that the sums mentioned in the mortgages were not paid at the date of the execution, nor was such large sums ever paid. In order to set aside a deed, some equity must be shewn to override the estoppel. The plaintiff only swears as to his belief. The mortgage of the 16th day of April is perfectly valid, notwithstanding that it was given for a sum larger than was actually advanced. *Potter v. Edwards* (a), *Rowntree v. Jacob* (b).

Milford, in reply, asked for leave to bring further evidence.

The PRIMARY JUDGE gave leave to both parties to bring further evidence as to the consideration given for the indentures of the 29th day of January, and the 16th day of April, 1859.

On this day, the cause was again set down for hearing.

For the plaintiff, the evidence disclosed that on the 28th day of February, 1859, *C. H. Roberts* sequestered his estate, which was released on the 15th day of April, 1859, and that he again sequestered his estate on the 11th day of October, 1861.

Roberts stated that at the time the indenture of the 29th day of January was executed, *Gregan* told him that he was indebted to him in the amount of £1,500, for judgments and promissory notes, &c., which he had purchased—and that he, relying on *Gregan's* statement, inserted that amount as the consideration of the mortgage, but that he had since ascertained that the amount due by him was much less. He denied that any account was then or at any other time shewn to him.

With respect to the indenture of the 16th day of April, 1859, *Roberts* stated that the sum of £2,400 therein mentioned, was merely a nominal consideration intended to represent the amount then due by *Roberts* to his several creditors. That he never said anything about *Gregan* or *Graham* compromising with his creditors and retaining the balance; that, on the contrary, it was agreed that they should pay the creditors in full. That *Graham* acted as *Roberts'* solicitor in having his estate released from sequestration, and that he prepared the indenture of mortgage himself, which was attested by *Gregan*; and that the defendants were not bound to pay the creditors, and in fact did not pay them all.

The plaintiff stated that at the time of the sale of the assets of *Roberts*, the solicitor for the official assignee informed the person present that from the evidence given by *Gregan* and *Graham* in *Roberts'* insolvency, relating to this mortgage, these mortgages would be much reduced in amount if the purchaser would file a bill in equity for that purpose.

Several of the creditors of *Roberts* swore that about the time of the indenture of the 11th day of April, 1859, *Gregan* and *Graham* had requested them to effect and compromise, and saying that it would be for the benefit of *Roberts*.

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For the defendants, there was put in an account furnished by *Gregan* to *Roberts*, shewing the several sums which made up the sum of £1,500, and which account was examined by *Roberts* on the 28th day of April, 1862, in the presence of Mr. W. G. *McCarthy* (the solicitor for *Gregan*), and admitted to be correct. *Roberts* also at the same time, and at other times, admitted to Mr. *McCarthy* that under the indenture of the 16th day of April, 1859, the defendants were to get as a bonus the balance, if any, between the sum of £2,400 and the sum actually paid. The defendants both reaffirmed the statements made in the answer, and stated that had it not been for the inducement of the bonus, they would not have entered into the arrangement at all, as *Roberts* was in a very precarious state of health, and their only security was his life estate. That *Roberts* gave them a list of the creditors with the sums due to each, amounting in the whole to £2,400; and that they had paid all these creditors to the amount of £1,700, or thereabouts—some of them in full, and others by compromise.

The *Attorney-General* and *Milford* for the plaintiff. The defendants shew that the consideration given for these deeds was not that stated in the deeds themselves, for there the consideration is said to have been paid at the execution of the deed. The deed cannot, therefore, act by estoppel. The account given now by *Gregan* as to the £1,500, is different from that given at his examination in the insolvency of *Roberts*. It is clear that *Roberts* was in difficulties, and was completely at the mercy of *Gregan*. It is enough to allege in the pleadings that the consideration was not paid, and the evidence discloses such a case as will induce the Court to enquire fully into all the transactions. One of the mortgagees, *Graham*, was *Roberts*' solicitor in this very affair. *Sugden's V. & P.* (a), *Story's Eq. Jur.* (b), *Bowen v. Kirwan* (c), *Gibson v. Russell* (d), *Watt v.*

(a) p. 236, par. 24.
 (c) L. & G. 65.

(b) p. 310.
 (d) 2 Y. & C.C.G. 34.

*Grove (a), Drought v. Eustace (b), Hoffman v. Cook (c),
Lawley v. Hooper (d), Macreath v. Simmons (e).*

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Owen for the defendant Gregan.

Broadhurst, Q. C., for the defendant *Graham*. The further evidence attempts to set up a multitude of equitable grounds for setting aside these deeds, so far as the consideration is concerned, but not one of them are set forth in the pleadings. *Roberts* sets up fraud and misrepresentation as to the deed of the 29th January, poverty, partial duress, and the case of a young weak minded man in the hands of a sharper; and as to the deed of the 16th April, 1859, that it was between a solicitor and his client, and a money lender and his victim. All these matters must be disregarded, as they have not been brought forward in the pleadings. Until the further evidence was taken, the defendants had no notice of any such grounds. *Roberts* himself could not have impeached these deeds, for he has allowed five or six years to pass without doing so, and his official assignee in two insolvencies has never taken any steps in that way. The plaintiff should have amended his bill, and impeached the agreements which we set forth in the answer. All he can do now is enquire what those agreements were. On that point, the evidence is entirely on one side as to the indenture of the 29th January, for *Roberts* admits it, but pretends that he has since found out that he did not owe so much. As to the indenture of the 11th April, all the probabilities are in favor of the agreement we state. The cases where deeds have been set aside as having been entered into by a solicitor with his client, are all where the solicitor has been the family solicitor, or one long and confidentially employed. Here *Graham* only acted for *Roberts* in this transaction. The plaintiff cannot in any form of pleading impeach these deeds. If he purchased with that view, the Court would

(a) 2 Sch. & Lef. 501.
(c) 5 Ves. 626.

(e) 15 Ves. 329.

(b) 1 Moll. 332.
(d) 3 Atk. 281.

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not assist him, as it would savour of maintenance and champerty. *Prosser v. Edmonds* (a), *Harris v. Kemble* (b), *Clapham v. Shillito* (c), *Knight v. Majoribanks* (d), *Montesquieu v. Sandys* (e), *Smith v. Kay* (f).

The *Attorney General* in reply. It is not necessary to charge the facts which have come out in evidence. The Court has allowed this evidence to be given, and now it discloses a state of things which the Court will make a searching enquiry into. In all transactions between solicitor and client the Court exercises extreme vigilance, and will not allow a solicitor to get any benefit, only so much as he has actually advanced. It is quite clear that the defendants had *Roberts* completely in their power, and did what they chose with him.

August 19.

On this day judgment was delivered by his Honor the PRIMARY JUDGE.

This is a suit instituted for redemption by the owner of the equity of redemption of land and houses comprised in two mortgages, one appearing on the face of it to be for £1,500, made by *Roberts* to the defendant *Gregan*, and the other appearing on the face of it to be for £2,400, made originally by *Roberts* to the defendant *Graham*, but now vested in him jointly with the defendant *Gregan*.

There is no question but that there must be a decree for redemption; but the only point raised is whether the considerations mentioned in the deeds can be disputed as not being the true considerations for them.

It is quite plain from the evidence that the statements in the operative parts of the deeds, that the conveyances were respectively made in consideration of £1,500 and £2,400 respectively paid at the time of the execution of the deeds, is not true. No money, in fact, passed at the time. This opens the question as to what really were the considerations for these deeds respectively; and if the

(a) 1 Y. & C. 496.
(c) 7 Beav. 149.
(e) 18 Ves. 302.

(b) 1 Sim. 111.
(d) 11 Beav. 322.
(f) 30 L. J. Ch. 45.

Court, either by means of the evidence before it, or by a reference to the Master, should find that the consideration was less in amount than the sums mentioned in the deeds, it would consider the sums so shown to be the real considerations as the principal money originally advanced, and the decree would be for an account on that footing.

If I can ascertain the amount of what ought to be considered as the principal in these cases, of course I shall not send it to the Master to make that enquiry. I find, on attentively reading the evidence, that I am in a position to do so.

First, as to the mortgage for £1,500. This was made on the 29th day of January, 1859. *Roberts*, the owner of the estate, was then in difficulties, and, in fact, his estate was sequestrated on the 28th of February following.

Amongst other creditors, he was indebted to the defendant *Gregan*, who had advanced money to and for him, and had obtained by purchase or otherwise judgments against him. Under these circumstances, it was agreed between *Roberts* and *Gregan* that the former should give the latter the mortgage in question, on the representation that the sum of £1,500 was due. It does not appear that an account in writing was actually furnished by *Gregan* to *Roberts*, but he subsequently saw the account in Mr. *McCarthy's* possession, by whom it was read to him, and admitted that it was correct. Nor did he ever call it in question, either in the insolvency proceedings in 1859, or in the insolvency proceedings in 1862 (for *Roberts* was twice in the Insolvent Court). It is said that when *Gregan* was examined under the second insolvency, he did not give the same account of what was the consideration for the deed as he does now, or as appears by the account in Mr. *McCarthy's* hands which was shown to *Roberts*. But it will be seen, by examining this, that he at first speaks generally without books and papers, but afterwards rectifies his examination by reference to books and to a statement then in his hands. He was examined first on the 9th of April, 1862, and again on the 15th of the same month. He gives also an

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account of further advances, but with that we have nothing to do; although there is no evidence that there was an actual settled account between *Gregan* and *Roberts* when the deed was executed, such may be inferred from the execution of the deed itself, and from *Roberts'* recognition of the account when he saw it afterwards, and by his never disputing it, either in the insolvency proceedings or afterwards, till now.

I am of opinion, therefore, that the sum of £1,500 is to be considered as the principal money on which the Master is to take the account as incurred by this mortgage. Of course he will see what further advances have been made.

Then as to the other mortgage for £2,400, the defendants state that a list of debts was given them by *Roberts*, as must have been the case, and that they agreed to get them discharged in consideration of £2,400 to be secured by this mortgage. It does not appear what the amount of the debts actually was, for the list is not produced, nor does it appear that all *Roberts'* debts were mentioned. *Roberts* now says the mortgage was given to secure only the amount that they might pay, and that £2,400 was only a nominal consideration; but he appears to have often stated the reverse to Mr. *McCarthy*, and that the defendants were to have a bonus, as stated by them. *Roberts'* interest, which he mortgaged, was only an estate for his own life, which, though a young life, was not a good one, he being then in bad health. Now, what should induce *Graham* and *Gregan* to run the risk of paying off these debts without any consideration, and with no certainty of ever being repaid? I cannot believe that such was the arrangement. It is much more likely that the agreement should have been such as is represented by the defendants, that they should have a bonus and make the best bargains they could with the creditors. This deed was never questioned by *Roberts* any more than the other, so far as now appears. There was a bill filed by him against *Graham* in some way questioning this deed, but the proceedings are not in evidence, and it may have reference to the further

advances, to secure which it was given, as well as to secure the sum of £2,400, or to rents received by *Graham*. There is no objection made by *Roberts* under either of the insolvencies. It is said that several of the creditors were given to understand by *Gregan* that if they took less than their debts it would be for the benefit of *Roberts*. There is only one witness, however, who says that this representation was made by *Gregan* in *Roberts'* presence, and it appears to me that such representations may have been made by *Gregan* falsely, and perhaps with the sanction of *Roberts*, in order to enable him to get a larger benefit under the deed; and if so, they cannot affect the agreement between *Roberts* and *Graham* and *Gregan*. I must say I think the agreement was such as is represented by the defendants. I need not, therefore, enquire what was paid by the defendants under the deed, but must take the sum of £2,400 as the principal money on which the interest is to be charged. Of course, further advances will have to be taken into the account. It was said that the agreement between *Roberts* and *Graham* and *Gregan* cannot stand, because *Graham* was *Roberts'* attorney, and it was made under pressure. The agreement, however, must be taken to be valid till set aside by a decree of this Court. It has not been set aside, nor can it be in this suit. The question here is what was the consideration for the deed, and it is shown to be this agreement which was performed by the defendants on their part, for they say, and it is not denied, that they paid all the debts in the list, i.e., all the debts they contracted to pay, though *Roberts* may have subsequently paid some debts which he then owed.

I therefore declare that these sums are to be taken as the principal moneys advanced, and direct the account in the usual form in a redemption suit where the mortgagee has been in possession.

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June 27.

DIGHT *against* GORDON (a).

Appeal for
costs only
allowed in
this colony.

THIS was an appeal by the defendant from the decree upon further directions of his Honor the Primary Judge, whereby the defendant was decreed to pay the costs of the suit.

Gordon and *Milford*, for the respondent, took a preliminary objection, that this was an appeal for costs only, and therefore would not be entertained by the Court, and cited *Chappell v. Purday* (b), *Angell v. Davis* (c).

Sir *W. Manning*, Q. C., and *Shephard*, for the appellants, cited *Collard v. Roe* (d), *Norton v. Cooper* (e).

STEPHEN, C. J. The decrees or orders of the Primary Judge are binding only when not appealed from, so that when appealed from, the decree, so far as it is appealed from, is not binding upon the parties. A person who feels aggrieved by being ordered to pay costs, has the right to appeal. The Court here is in a different position from that of the Vice Chancellor in England. We are governed by the wording of the Statute under which appeals in Equity are brought (f), which provides "that it shall be lawful for any person feeling aggrieved by any such decree or order, at any time within fourteen days next after the pronouncing or making of the same, to enter an appeal in the office of the Court against such decree or order, &c." This, in my opinion, obliges us to hear appeals of all sorts, and leaves us no discretion as to whether we ought or ought not to entertain an appeal for costs.

MILFORD, J. I do not see that the Court in this colony stands in a different position from that of the

(a) Coram, full Court.

(c) 4 M. & C. 362.

(e) 5 De G. M. & G. 728.

(b) 2 Ph. 227.

(d) 28 L. J. Ch. 560.

(f) 4 Vic., No. 22, a. 21.

Vice Chancellor in England. There is no enactment or express rule in England that there shall be an appeal upon all matters except costs; but the appellate Court refuses to hear any appeal upon costs; and if the Courts of appeal in England can refuse to hear appeals upon costs, we can do so here. We follow the decisions and practice of the English Courts, except where there is a rule to the contrary, and I am not aware of any such rule here. The practice is the same as in Lord *Hardwick's* time. If the appeal be substantially for costs, the Court will not entertain it, on the ground that other unimportant and incidental matters are included. Costs are almost always discretionary, and if appeals were allowed in respect of them alone, a very wide door of uncertainty would be opened.

WISE, J. I quite agree with the remarks of Mr. Justice *Milford* as to the inexpediency and inconvenience of allowing an appeal upon the question of costs. No doubt it is better that there should be finality, especially in Equity, but I regret that I cannot see that we have any alternative, and that we are expressly bound to entertain this appeal. It is plain that in England the Court would not allow any such appeal; and if it had not been for the express words in the statute, I should have had no doubt that we could not have allowed it. The statute gives not only the same rights of appeal as in England, but provides expressly that any person aggrieved should have a right of appeal in respect of the matter in which he is aggrieved. Here the appellant alleges that he feels aggrieved by being decreed to pay the costs of this suit. I think the statute compels us to entertain every appeal of every person who may be in any way aggrieved. No rule of Court would deprive us of the power to entertain this appeal. It might act as a safeguard against frivolous appeals, if the costs were taxed and payment enforced immediately.

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August 17.

GLASCOCK *against* FOREMAN.

Vesting order
made by con-
sent where
Crown repre-
sents estate of
heir at law of
intestate, who
was out of the
jurisdiction.

THIS was an application for an order under the Trustee Act, 1852, vesting the fee in certain lands sold under the decree in this suit in the purchasers. The heir at law of the intestate was out of the jurisdiction of the Court, and his estate was represented by the Attorney General.

Gordon, in support of the motion, cited *Re Minchin's Estate* (a), *Wilks v. Groom* (b).

Owen, for the Crown, consented.

The PRIMARY JUDGE. As the Crown appears to consent, I think this order may be granted.

September 19,
20, 21.

TALBOT *against* CUNNINGHAM (c).

In suit for
specific per-
formance
defendant
claimed com-
pensation as
having been
misled by
plaintiff's
misdescrip-
tion. Held,
that as de-
fendant had
ample oppor-
tunity to
verify the
description,
he could not
claim com-
pensation.

THIS was an appeal by the defendant from the judgment of the Primary Judge, decreeing specific performance of an agreement without allowing the defendant compensation, claimed by him for alleged misdescription by the plaintiff.

The facts of the case and judgment of the Court below are reported *supra* (d).

The Attorney General and *Gordon* for the appellant.

Sir W. Manning, Q.C., and Milford for the respondent.

STEPHEN, C.J. I do not see that there has been any misrepresentation by the plaintiff in this agreement. The description is doubtless very vague, and any one

(a) 2 W.R. 179.

(c) Coram, full Court.

(b) 6 De G. M. & G. 205.

(d) Vol. III., Pt. I., p. 8.

reading the agreement might at first sight take the same view of it as the defendant, namely, that the run was a four sided figure; but strictly, as there are only three sides mentioned, it would appear to be triangular, and such in fact is the shape of the run. There was no statement of acreage, nor any attempt to give the exact area. There was a misstatement of the amount of rent and assessment—it matters not whether intentional or not—but that does not imply that the area was greater than it really is. It might lead the defendant to infer that, but not necessarily. It would shew only what were the capabilities of the run. The area might be small, but rich and productive, and then the assessment would be high. But before the contract was entered into, the letter of *Forbes* to the defendant shews that the utmost capability of the run was to depasture 1,500 cattle, whereas the assessment would have shewn a capability to depasture 3,000. However, the main ground upon which I decide is that there was a specific sale according to the government description. It cannot mean that the government description is as described in the agreement, for a government description would be quite different. The very matters which the government description would have supplied, area, figure, extent, were all wanting in the description in the agreement. If there was any doubt felt by the defendant, he should have resolved it, by a reference to the government description. Further, the defendant was told to go up to the station and examine it for himself—and for this purpose a month was allowed; accordingly, the defendant's son went up to the station, and rode about looking after the cattle. He had therefore ample means of ascertaining the area of the station, and removing all doubts on the subject. Time and opportunity having been allowed him, it is too late now to raise this objection. I do not think that taking possession under the notice given that compensation would be claimed, amounts to a waiver. If the defendant ever had any right to compensation, he has still; but I do not think he ever had any. Upon every principle of moral justice, by which, to a

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great extent, the discretion of the Court in specific performance must be governed, it appears to me that the plaintiff has done all that he was bound to do; and after the means at the disposal of the defendant to clear up the ambiguities of the contract, it would be an act of injustice to give him compensation. If the plaintiff had brought his action at law he must have succeeded, and then the defendant would have been obliged to come into this Court to raise the question. The appeal therefore must be dismissed with costs.

MILFORD, J. If the plaintiff had filed his bill at the first, I am not sure that I should have decreed specific performance, as both parties seem to have acted under a misunderstanding. Now, however, it is different—on both sides the contract has been partly performed, in fact nothing remains but the payment of the purchase money. The reason I did not give costs at the hearing in the Court below, was that the plaintiff had not expressed himself in his contract in the clear and unambiguous manner he should have.

WISE, J. Each case must be governed by its peculiar circumstances, subject to general principles. The property in this case was held under lease from the Crown. The boundaries were all ascertained and fenced in. The run was sold according to the government description. The purchaser could not get more nor less than what the government recognizes as the run. There is an ambiguity as to the lines said to enclose the run, and as to the amount of the rent and assessment. The compensation sought is not as to the supposed greater extent of the run, but its supposed greater capabilities. Yet it was stated in the letter that preceded the contract that the run only carried 1,500, shewing that the amount of assessment was clearly wrong. The contract was left open for the defendant to inspect the run, which was done by his son, and he must have seen that it was fenced in. In *Dyer v. Hargrave* (a) no compensation was

allowed, because the place was fenced in. The defendant was not bound to take possession, and if he had repudiated the contract when he raised his objection to it, the Court would not have compelled him to complete it. The principle laid down in *Vigers v. Pike* (a) applies where the party continues to deal with the property after he has discovered his mistake. The contract embraced two runs, and it would be impossible to place the parties in *statu quo*.

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CUNNINGHAM.

BERRY against ELYARD.

September 27,
28, 29.

THE bill in this case was filed on the 7th of December, 1847, by *Alexander Berry*, as surviving partner of the firm of *Berry and Wollstoncraft*, and as executor of the will of *Wollstoncraft*, against *William Elyard*, praying that the contract or agreement thereinbefore mentioned or referred to might be specifically performed — the plaintiff being ready and willing, and thereby submitting to perform the contract or agreement on his part; or that the defendant might be declared to be a trustee for the plaintiff, as such surviving partner and executor as aforesaid, of the 500 acres of land before mentioned; and that the defendant might be ordered to convey the same to the plaintiff, his heirs and assigns, as such surviving partner and executor; and for an injunction to prevent the defendant from bringing any action or ejectment against the plaintiff to turn him out of possession of the said premises. The bill stated that *William Elyard*, the father of the defendant, became indebted to the firm of *Berry and Wollstoncraft* in £160; that the firm of *Berry and Wollstoncraft* were entitled to land at Shoalhaven, the boundaries of part not having been defined; and that the said *W. Elyard* had obtained a promise from the Crown of 1560 acres which he had selected within the boundaries claimed by *Berry and Wollstoncraft*, and disputes having arisen, a

Specific performance of contract concluded in 1831 and confirmed in 1841; bill being filed in 1847, refused on the ground of laches. Confirmed on appeal (dissentient, Ch. J.), but under the circumstances without costs of the Court below or appeal.

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compromise was effected, whereby certain other lands of *Berry* and *Wollstoncraft* were agreed to be allotted to *Elyard* in lieu of the 1,650 acres, which were to remain the property of *Berry* and *Wollstoncraft*, and 500 acres, part of the land agreed to be allotted to *Elyard*, should be held by *Berry* and *Wollstoncraft* in satisfaction of the said debt and contract, and accordingly articles of agreement were entered into between *Elyard* and *Berry* and *Wollstoncraft*, dated the 7th of September, 1829, whereby it was agreed that the 1,560 acres claimed by *Elyard* were to be considered as his, and that they should be exchanged in the following manner:—1,060 acres in the possession of *Berry* and *Wollstoncraft*, part of *Hume's* grant, at the south of a creek therein mentioned, and estimated at 520 acres, and a part of their lands on the west, amounting to another 500 acres, together 1,060 acres, should be transferred to *Elyard*, and the remainder of the 1,500 acres, say 500 acres, to be held by *Berry* and *Wollstoncraft* as a settlement of the debt, and that the northern creek should, at the sole expense of *Berry* and *Wollstoncraft*, be rendered navigable for boats from the mouth or entrance to such portion of *Hume's* grant as was thereby agreed to be transferred by them to *Elyard*, by the removal of fallen trees or other temporary obstructions, and also that they should make such arrangements as that the house and fencing which then stood upon that portion of *Hume's* grant to be exchanged, should be transferred to *Elyard* as part of the exchange. That negotiations were afterwards entered into with the Government for the purpose of carrying into effect the said agreement, which were afterwards altered, and it was ultimately agreed that a grant should be made to *Elyard* of 1,560 acres on the western side of the creek, and a grant of 1,560 should be made to *Berry* and *Wollstoncraft* on the eastern side, and that *Elyard* should convey to *Berry* and *Wollstoncraft* 500 acres, part of his 1,560 acres, in satisfaction of the debt; and as evidence of such ultimate arrangement and as constituting the agreement, the bill stated three letters referring to a certain plan—two from *Elyard* to

Berry and *Wollstoncraft*, dated respectively the 27th of January, 1831, and the 8th of March, in the same year, and the third from *Berry* and *Wollstoncraft* to *Elyard*, dated the 6th of April, in the same year. The bill went on to state that the letter of the 8th of March, 1831, inclosed a chart referred to in it, shewing the boundaries of the 500 acres, and the other land of *Berry* and *Wollstoncraft* and *Elyard*; the death of *Wollstoncraft* in 1832; the appointment of *Berry* as his executor; and probate of his will; that the said *Elyard* having given his son, the defendant, his interest in the said 1,560 acres, the defendant wrote and brought to the plaintiff a letter containing that information, and proposing that the defendant should apply to the Government that the grant of the 1,560 acres might be made out in the name of the defendant, and promising to give the plaintiff the transfer of his 500 acres after he should have obtained the grant, provided the plaintiff should not object to the said arrangement, and would not oppose the defendant in the Court of Claims; that the plaintiff assented, and did not oppose the defendant in the Court of Claims, and the defendant obtained the grant of 1,560 acres (with notice of what had passed between *Berry* and *Wollstoncraft* and his father), dated the 23rd of April, 1841. The bill then described the boundaries of the 500 acres claimed by the plaintiff, and stated that *Elyard*, the father, put the plaintiff in possession of the 500 acres, and that he was now in possession of them, and had fenced a part of them. The bill then charged that the defendant executed a mortgage of 1060 acres, omitting the 500 acres belonging to the plaintiff; that he threatened an action of ejectment; and that neither the defendant nor his father ever asked the plaintiff to clear the creek, or complained of obstructions therein, and that the creek did not want clearing—the same being navigable for boats until the defendant stopped it up in order to make a crossing-place. The bill then offered, if there were any obstructions at the time of making the agreement, to remove them.

The defendant put in an answer to the bill on the 27th

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of April, 1848, admitting the agreement of 1829, but alleging duress, and admitting the letters of 1831. He did not, however, admit the letter said to be written and given to the plaintiff by him, stating the gift by his father to him, and his offer to convey the 500 acres if he should not be opposed in obtaining the grant. He said that he (the defendant) obtained the assignment from his father, for valuable consideration, without notice, and alleged that the plaintiff was not entitled to the 500 acres he claims, though he admitted that the boundaries which the plaintiff claims were correctly set out in the bill. He did not admit the plaintiff's possession, and insisted that as the plaintiff did not clear the creek according to his agreement, he (the defendant) was not bound to perform his part of it—or, if he was, the plaintiff was bound to clear the creek. He insisted on the Statute of Limitations, and the want of privity between the plaintiff and defendant.

The *Attorney General* and *Gordon* for the plaintiff. In the year 1829 *Berry* and *Wollstoncraft*, being creditors of Dr. *Elyard* (the father of the defendant) to the amount of £160, agreed to take the land in liquidation of their claim. There was also an agreement that the creek should be rendered navigable by the removal of trees or other temporary obstructions; this, however, was an independent agreement. In 1832, *Berry* was put into possession by Dr. *Elyard*, and he has ever since remained in possession. In 1841, at the time of the new contract between *Berry* and the defendant, *Berry* was in possession. When the defendant was applying for the grant, he recognised *Berry's* right to the land. As *Berry* has ever since been in possession, and as his equitable title is perfect, laches cannot now be set up as a defence against clothing him with the legal estate. There was no necessity for him to file a bill until ejectment was brought against him. As soon as that was done, he filed his bill and the action was abandoned. It was then unnecessary to proceed with the suit in equity until his possession was further menaced. When that

was done *Berry* continued the suit, and since its continuance the second action of ejectment has been abandoned. Laches never can be set up where the party is in possession of the substance of the contract. This being a contract in reference to land, the statutory limit is 20 years. The 24th section of the 3rd and 4th W. IV., c. 27, is the only statutory bar, and that refers back to the 2nd section, making 20 years the limit. The defendant never demanded the clearance of the creek, and so he is barred by laches from now enforcing it; but that does not prevent the plaintiff, who is not barred, from enforcing his contract. *Fry* on Specific Performance (a), *Gibson v. Goldsmith* (b), *Crofton v. Ormsby* (c), *Clark v. Moore* (d), *Sharpe v. Milligen* (e).

Sir *William Manning*, Q. C., *Broadhurst*, Q. C., and *Milford* for the defendant. The clearance of the creek is a condition precedent to the performance of the contract by the defendant; and as that has not been done, the plaintiff cannot sustain his bill for specific performance. The creek was to be cleared immediately, but the grant was not to be obtained at any definite time. There has been no waiver by the defendant of his right to have the creek cleared. The mere failure to prove a demand does not amount to a waiver. At most there was only forgetfulness on the defendant's part, and a Court of Equity would relieve against that. In *Gibson v. Goldsmith* (f) the covenants were distinct and separate; here, the duty to clear the creek was an integral part of the agreement. In his bill the plaintiff offers to perform his part of the agreement. In specific performance the plaintiff must be prompt, and must not sleep on his rights. The plaintiff's possession extended only over a very small portion of the land, over all the rest the defendant remained in possession. The defendant was no party to the agreement between the plaintiff and his father, he claims as a purchaser without notice. No new agreement has been proved. There is no evidence

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(a) p. 322.
(b) 5 De G. M. & G. 757.
(c) 2 Sch. & Lef. 581, ps. 602-3.
(d) 1 J. & L. 728, p. 727.
(e) 22 Beav. 606.
(f) *Infra*.

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that the letter on which plaintiff relies was ever signed; it cannot, therefore, be a declaration of trust. Before the grant issued, neither party had any right to the land. Plaintiff could not have obtained the grant, therefore the withdrawal of his opposition could not be any consideration. The terms of the new agreement, which the plaintiff sets up, are too vague and ambiguous for the Court to enforce. After the lapse of twenty years the Statute of Limitations is a bar, and even within twenty years laches may prevent the Court of Equity from lending its assistance. *Fry* on Specific Performance (a), *Addison* on Contracts (b), *Story* on Eq. Jur. (c), *Lewin* on Trusts (d), *Hillas v. Magoreran* (e), *Lord J. Stuart v. L. & N. W. Railway Company* (f), *Dale v. Hamilton* (g).

The *Attorney General* in reply. The consideration for the 500 acres was the extinguishment of the debt due by *Elyard*, senior. The clearance of the creek formed no part of the consideration, but was a separate agreement. The defendant has either recognised our right freed from the stipulation as to the clearance of the creek, or has made a declaration of trust. Plaintiff has over and over again recognised our right to the land, but never once required the creek to be cleared. The forbearance to press his claim in the Court of Claims is a good consideration, for then defendant would not be obliged to go before the Court at all. In *Haigh v. Brooks* (h), the giving up a void guarantee was held a good consideration. Plaintiff's equitable title is complete, and he is not required to be prompt in clothing himself with the legal title. Defendant had full notice of our claim, and specific performance will be decreed against a purchaser with notice. The offer to perform in the plaintiff's bill is not binding. 2 *Spence* Eq. Jur. (i), 1 *Madd. Ch. Pr.* (k), *Story* Eq. Jur. (l), *Fry* on Specific Performance (m), *Knight v. Bowyer* (n).

(a) ps. 322, 618, 738.

(c) s. 140.

(e) 2 Sup. Court R., Eq. 32, 60.

(g) 5 Hare. 381.

(i) p. 20.

(l) s. 784.

(b) p. 20.

(d) p. 64.

(f) 1 De G. M. & G. 721.

(h) 10 A. & E. 309.

(k) p. 532.

(m) p. 32.

(n) 2 De G. & J. 421.

The PRIMARY JUDGE having recited the facts as above, delivered the following judgment:—

The bill is clearly framed on the agreement, as constituted by the articles of 1829 and the letters of 1831, for *Wollstoncraft* died in 1832, and the suit is by the plaintiff in his capacity of surviving partner of the firm of *Berry and Wollstoncraft*, and as executor of *Wollstoncraft*, so that if there were any new contract created by the letter said to have been written in 1841, just prior to the grant to the defendant, that is not the contract on which the plaintiff sues. This appears, too, by the plaintiff's offer to perform his part of the contract, and by his statement of clearing the creek as a thing he was bound by the contract to perform. I can only look on the letter of 1841 then, even if sufficiently proved, as evidence of what the former contract was, or perhaps as a ratification of it by the defendant, so far as he is concerned, or a statement of willingness to be bound by it.

I do not conceive that the original contract of 1829 was varied beyond what appears to be a variation by the letters of 1831. They do not touch upon the clearance of the creek, and I think that continued to be a matter to be performed by the plaintiff, as I do not see that there is anything to show that it was released or waived. That was an act to be done by the plaintiff in consideration of the transfer of the land by the defendant as much as the transfer of the land was an act to be done in consideration of the clearing the creek. This Court could never compel the performance of the one without securing at least the performance of the other. There appears to be no reason indeed why the creek could not have been cleared within a reasonable time, and as soon as the deed should be ready for conveying the 500 acres. However, nothing was done on either side before the recognition of the contract, in 1841, by which I will consider that all laches as to enforcing the contract had been waived up to that time. The Court did not formerly confine relief by decreeing the special performance of a contract within six years. If a proper case were made out, the Statute

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of Limitations did not apply; *Wright v. Howard* (a). The 24th section of 3 and 4 William IV., c. 27, has, however, now bound the Court of Equity not to exceed the time in which a person might bring an action at law to recover the land, but it has not prevented the Court from refusing a specific performance within that time. The plaintiff in such a suit must be prompt and eager, and must follow up his suit diligently; *Moore v. Blake* (b), *Dorin v. Harvey* (c). It cannot be said that a party lying by for six and a half years before he files his bill is prompt and eager. It is true that laches, in the technical meaning of the word, is not pleaded or insisted on in the defendant's answer, but in fact the same objection is made by his insisting on the Statute of Limitation, and if not set up as a defence, although not available on demurrer; *Ross v. Willouby* (d). I am not aware of any case which shows that it cannot be insisted on at the hearing. It is quite clear that delay in conducting the suit must be a ground of objection irrespective of any plea, or objection in an answer, and in this case the bill was filed as far back as 1847, and the answer in 1848.

It is said, however that may be, that this is not a suit for a specific performance, but for the execution of a trust; that the plaintiff has done all that he is bound to do, and the defendant has thereby become a trustee for him, and therefore laches will not affect this case; *Clarke v. Moore* (e). I acknowledge such would have been the case if the plaintiff had done all that he was bound to do, but he has not. Admitting that the debt has been discharged, and the house and fences arranged as agreed upon, nothing has been done to the creek, and clearly something must have been required to make it navigable, or such a stipulation would not have been inserted in the contract. I cannot see that that stipulation has ever been released or waived. The mere circumstance that the defendant has not thought it worth

(a) 1 Sim. & Stu. 190.

(c) 15 Sim. 49.

(b) 1 Ball & B. 69.

(d) 10 Price 2.

(e) 1 J. & L. 723.

his while to institute proceedings to get the creek cleared is not sufficient to excuse the plaintiff from following up his claim to the land promptly.

I am sorry to come to the conclusion that the plaintiff cannot be relieved in this suit, for there can be no doubt but that a valid agreement by which the plaintiff was to be entitled to the 500 acres had been entered into between the plaintiff and *Elyard* the father. I must, however, dismiss the bill with costs, there having been such extreme laches on the plaintiff's part both before and after filing of the bill.

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The plaintiff appealed from the judgment of the Primary Judge. December 12
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The *Attorney General*, *Gordon*, and *Campbell* for the appellant, cited in reference to the question of laches after the filing of the plaintiff's bill, *Cane v. Allen* (a).

Sir *W. Manning*, Q. C., *Broadhurst*, Q. C., and *Milford* for the respondents.

On this day, judgment was delivered

January 13,
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STEPHEN, C. J. Although with great distrust of my own judgment, I am unable to concur with the other members of the Court in this matter. It appears to me, after consideration of the authorities and arguments, that the plaintiff is entitled to a decree—subject to the clearing of the Crookhaven Creek, along the space indicated by the original agreement of 1829, of all temporary obstructions existing then or in April 1831. I am of opinion, notwithstanding the sincerest deference to those of my colleagues, that the laches of which the plaintiff has undoubtedly been guilty does not, under the very peculiar circumstances of this case, deprive him of his just claim to the protection of the Court, against as inequitable an attempt on the part of the defendant, under sanction of a bare legal title, as (according to my

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apprehension of the facts) could well be made on a neighbour's property.

To persons unacquainted with the loose habits of trafficking in land, which have prevailed in this colony from very early times, and with which the litigation in this Court during the last twenty-five years has made me familiar, the fact of a proprietor's remaining content for ten, twelve, or more years, under no better legal title than possession, will appear strange and unaccountable. The circumstance however is notoriously common, in respect of ungranted lands, and has not been infrequent in the case of lands granted. Of Mr. *Elyard's* 1,560 acres, occupied in or about 1831, there were 1,060 acres mortgaged by him in 1834; and yet no grant issued (as we have seen) until 1841—and then the whole tract was conveyed, not to the two actual transferees entitled, but to the defendant. It may perhaps be thought, in the present case, that the plaintiff abstained from insisting on a conveyance, because he wished not to provoke discussion respecting obstructions in the creek—which, if they existed, he might be held liable, as a preliminary step, to remove. I attribute no such unwillingness to the plaintiff; but if even I believed this to be the real cause of his delay, I should still not hold that he was thereby disentitled to the relief sought by him.

The promptness which is reasonably to be expected, under ordinary circumstances, from a person who wants the aid of a Court of Equity to enforce performance of an agreement, has certainly not been exhibited in this matter. But, in the year 1841, when the grant issued to the defendant, the plaintiff had already been in possession of his 500 acres for nearly ten years, while the defendant or his father occupied, during the same period, the remaining 1,060 acres and no more. There had, on the one side, been no demand for liquidation of the released debt and interest, while on the other there had been no application to clear the creek, nor (so far as appears) any complaint whatever about obstructions therein. In 1834, the father mortgaged these 1,060 acres specifically to one *McVitie*. In 1836, in a letter directing an

application for convict servants, he mentions the fact that his farm contained 1,060 acres only. Pending this state of things, moreover (although the defendant now wholly repudiates his father's agreement), the defendant by an act of his own—that is to say, an advertisement in May and again in September 1840, offering the 1,060 acres for sale,—unequivocally and publicly recognised the plaintiff's title. It is remarkable, that in this advertisement reference is specially made to the water advantages of the farm; from which, it is said, produce could be conveyed to the harbour equally by water as by land. Surely, if obstructions at that very time existed in the creek, this could not have been stated with truth; or, if the defendant had thought the plaintiff bound to clear it from any obstruction, that was the occasion to have applied to him. Again, after the grant—that is to say in November 1843, confirmed in December 1844, the defendant mortgages the same 1,060 acres, neither less nor more, to a brother. Under such circumstances, the plaintiff must have thought himself secure; and may very pardonably, therefore, and in my opinion naturally have concluded, that no question as to clearing the creek bounding these 1,060 acres, nor any attempt to disturb his own possession of the 500 acres, would ever arise or be made, on the part of this defendant.

At the close of the year 1847, however, the plaintiff finds an action of ejectment brought or threatened. He is then driven to seek the interposition of this Court; and, if it be not afforded, the plaintiff—unless in a position to rely on the Statute of Limitations—is remissless. He has long since paid, in effect, the purchase money for the land, confessedly its probable value at the time, and has lost the possibility of recovering his debt, the interest on which alone would now amount to a large sum; while he and his tenants will be ejected, at the instance and for the benefit of a person claiming under the debtor, with full knowledge before acquiring any title to the property, of all the facts evidencing that of the plaintiff. Neither is it immaterial to observe, that (as I collect from the letters in evidence) the defendant's

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father acquired by the transaction, as part of his 1,060 acres, land which at the time was the plaintiff's own—by original location or purchase ; and which, therefore, the latter now can never reclaim.

In my opinion this is a state of things, which takes the case out of the general rule as to laches. The suit is in form, no doubt, one for a specific performance—and the contract relied on, it must be admitted, is either one by which the defendant himself is bound, or the bill cannot be sustained. But the plaintiff in truth, as I understand the case, simply desires to be let alone. So long as the defendant is content to bring no ejectment, the plaintiff asks nothing from him ; and an injunction against such an action is all, I take it, that the plaintiff wants now. He commenced this suit to stay the ejectment then threatened, and abstained from prosecuting it further, until a similar action was again threatened and brought. If the defendant had chosen to do so, he could long since have moved to dismiss the bill—or he could have prosecuted his first, or begun and prosecuted years ago a second action. I do not think him entitled, by abstaining equally from every such course, now to take advantage of the double delay, as an answer to the plaintiff's prayer for relief, against the defendant's own stale claim. That claim appears to me to be so inequitable, that this Court ought to restrain the defendant from enforcing it—although I think, on the whole, that our decree should be subject to the condition respecting Crookhaven Creek, which has been already intimated.

It should be added, with respect to the delay accruing up to 1888, if not to the year 1848, that by the then existing Crown regulations (so it appears from the correspondence), grantees could not transfer their land, formally at least, until the expiration of seven years. The defendant's father accordingly proposed, in July 1832, the substitution of a 99 years' lease. What was the reply to this proposal, or whether anything was done in consequence of it, I am unable to discover ; but, after the starting of such an objection (which would not have been removed by the suggested contrivance), Mr. *Elyard*

could hardly be allowed to call the delay, during those seven years, laches in the plaintiff. Until 1841, however, there was no legal title in any one to convey ; and at that time, I suspect, the restriction had ceased to be regarded in any quarter.

With respect to the defendant's knowledge of his father's contract, I consider the fact to be abundantly clear from the correspondence, independently of the transactions of the advertisement, and the mortgage in 1843. The defendant's letter to *Wollstonecraft* of 21st January, 1832, tends strongly to show that knowledge ; and a conversation with the defendant in that year, unequivocally evidencing knowledge, is positively sworn to by the plaintiff. I believe the latter's statement, moreover, as to his receipt of a letter from the defendant (before the procurement by him of the grant), promising to convey the 500 acres on obtaining a title. The date of this letter is not given ; but the father's announcement to the Government, that he had made over his right to the grant, was in December 1840—several months after the advertisement, which unquestionably describes only the 1,060 acres. The defendant does not actually deny the existence, or the sending, of such a letter ; while the plaintiff distinctly swears, that he received it from the defendant's own hand. Other details respecting it are added. The fact stated, too, is in itself highly probable.

The defendant has thought fit, however, not to rest his case on delay alone, or on the want of privity between himself and the plaintiff ; but has disputed even the existence of any completed contract with his father. The defendant has also alleged, in the face of overwhelming testimony on that point, deducible from the correspondence, that the arrangement made by that gentleman (whatever its nature) was the result of irresistible pressure put upon him. I agree with my colleagues in holding, therefore, that although in their Honors' judgment the bill must be dismissed, the decree of dismissal should be without costs—either of the suit generally, or of this appeal.

There is yet one point not yet touched by me—which

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is the defence set up in the answer, founded on sections 2 and 24 of the Statute of Limitations. As to this, I think it sufficient to say that, in my opinion, the enactments relied on do not affect the case ; and I do not know that, on this point, the other members of the Court differ from me.

It is, perhaps, unnecessary for their Honors, however, in the view taken by them of the matter, to express on it any opinion.

MILFORD, J. I have little to add to the opinion I gave when I heard this cause as Primary Judge. I feel satisfied that the plaintiff has been guilty of such laches in this case, that, however he may suffer from his neglect, this Court cannot relieve him.

Supposing that this Court will not grant a specific performance of the agreement, or an injunction which is prayed for and could only be granted in furtherance of a decree to that effect, and that, in consequence, the plaintiff should be without remedy, he would not be able to recover the debt originally due by the defendant's father to the firm of *Berry and Wollstonecraft*—that he would lose his land—and that the time for bringing any action for breach of the agreement would have past. All this would arise from his own laches. The contract was at the latest entered into in 1831. In 1841 it may be considered that the laches in not bringing his suit was condoned. The suit was not instituted till 1847, and was brought to a hearing only in 1863. There may have been reasons why the plaintiff chose not to take action, but he must be supposed to have known that by so doing he was losing his remedy. If at common law a person having a claim to an estate does not prosecute it within twenty years, he cannot be relieved, either at law or in equity, whatever may have been the reason for not prosecuting his claim, unless he were induced to postpone it by fraud or misrepresentation. So here the equitable rule is that a person seeking a specific performance of an agreement is bound to be prompt and eager in asserting his right ; but if for any reason he

thinks fit not to prosecute it, he has only himself to blame.

I am not clear that I was right in dismissing the bill with costs, for there were defences set up by the answer which were clearly false. The assertion that there never was any contract, as stated by the bill, the absurd attempt to rebut the inference drawn from the attempt to mortgage the land without the 500 acres, and generally the whole course of the defence, induce me to agree with the Chief Justice and Mr. Justice *Wise*, that the bill should have been dismissed without costs.

Wise, J. I agree with Mr. Justice *Milford* that the plaintiff has, by his laches, disentitled himself to the interference of the Court as sought, and that he must be left to his legal rights.

I think an additional reason for the Court declining to interfere, is to be found in the extreme difficulty, if not impossibility, at this distance of time, of ascertaining in what way the creek is to be cleared according to the agreement. The dismissal of the bill will in no way prejudice any right the plaintiff may have acquired by long possession.

The nature of the case, and the defence set up, seems to me sufficient reason for dismissing the bill without costs.

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RATTRAY *against* BLANCHARD.

November 15,
16, 22.

THE facts of this case are set out *supra* (a).

The bill stated the conveyance of land to trustees upon certain trusts, which were exhausted, with an ultimate trust for certain persons, the benefit of which had

circumstances which lead up to the equity alleged in the bill and denied in plea, but must not deny by answer the equity itself relied on. Plea, that defendant claimed no interest in the deeds, &c., in the bill mentioned, and that any knowledge or possession of the same in him was acquired as attorney of J.J. Held bad as being double. Amendment of plea refused. Plea to stand as part of the answer with liberty to except.

In negative
pleas, to
which answer
is required,
the rule is
that defen-
dant must
answer all the

(a) Vol. 3, p. 1.

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become vested in the plaintiff. The second paragraph of the bill stated that the agreement for the trust deed was carried into effect by the conveyance mentioned in the next paragraph. The third paragraph stated the conveyance, and that the deeds or instruments by which it was effected were in the possession or power of certain of the defendants, amongst whom *G. Allen* was named, who claimed some interest therein independently of the other defendants, but which they refused to discover. By the fourteenth paragraph of the bill, the plaintiff charged that the truth of the several matters thereinbefore mentioned would appear, if the defendants (naming amongst them *G. Allen*) would discover and set forth, amongst other things (which discovery they have refused to make), the dates of, parties to, and material purport, and contents of, all deeds, instruments, and other documents, papers, and writings, and of all drafts and copies of, or extracts from, all deeds and instruments and other documents, papers and writings in their possession or power in any way relating to the agreement in the second paragraph of their bill mentioned or referred to, or to the matters thereinbefore mentioned or referred to, or any of them. The bill prayed that certain of the defendants (not including *G. Allen*) might be declared to be trustees of the plaintiff of the premises in question, and might be decreed to convey the same to the plaintiff, and that an account might be taken of the rents and profits and payment thereof; and that certain defendants, amongst whom was the defendant *G. Allen*, might make a full and true discovery of all and singular the matters and things thereinbefore in that behalf mentioned, and might deliver to the plaintiff the deeds or instruments in the third particular of the bill mentioned or referred, &c.

Interrogatories were filed by the plaintiff. The 13th was as follows:—"Have not the defendants now, or had they not lately, and when last in their possession, custody, or power—or in the possession, custody, or power of their solicitors, or solicitor's agents or agent, divers, or some, and what deeds, or deed, drafts of deeds, or draft of a

deed, copies of deeds, or copy of a deed, accounts, or account, memoranda, or memorandum, letters, or letter, books or book, papers or writings, or paper or writing relating to the matters in the said bill mentioned, or to some, or one, and which of them, or how otherwise." The fourteenth interrogatory was as follows:—"Let the defendants set forth the dates of, parties to, and shew the material purport and contents of all deeds, instruments, and other documents, papers, and writings, and of all drafts and copies of, or extracts from all deeds and instruments, and other documents, papers, or writings in their possession or power in any way relating to the agreement in the second paragraph of the bill mentioned or referred to."

To this bill the defendant (*G. Allen*) pleaded the following plea:—"To so much of the said bill as seeks any relief or discovery from the defendant, save and except the discovery whether he claims any interest in the deeds or instruments in the bill named, does plead in bar thereto; and for, by, and by way of plea says that he does not claim, and never has claimed, any interest in the said deeds or instruments, and that any knowledge of, and concerning or possession of, the same in him, was acquired through the confidence reposed in him as attorney of one Mr. *Jones*, and this defendant not waiving his plea for answer to the residue of the plaintiff's bill, not hereinbefore pleaded to, denies that he claims any interest in the deeds and instruments in the bill mentioned."

Milford for the defendant, *G. Allen*. Where a defendant has no interest in the subject matter of the suit, and discovery only is sought from him, he ought not to be made a party. The facts pleaded shew that he is an improper party by denying the interest alleged, and setting up professional confidence as a bar to discovery of the deeds. This is not a double plea, as all the facts tend to one point. This being a negative or anomalous plea, the answer does not overrule the plea. In a negative plea, you must answer the averments pleaded. In

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the plea, we aver that we have no interest; but as it is charged in the bill that the defendant had an interest, it is necessary to deny it by answer. The answer is subsidiary only to the plea. The cases of *Pope v. Bush* (a), and *Edmundson v. Hartley* (b) are overruled, and in both cases leave was given to amend. *Mitford on Pleading* (c), *Story on Pleading* (d), *Daniels' Ch. Pr.* (e), *Wigram on Discovery* (f), *Plummer v. May* (g), *Saunders v. Druce* (h), *Strickland v. Strickland* (i), *Kirkman v. Andrews* (k), *Campbell v. Beauford* (l), *Bailey v. Adams* (m).

Gordon for the plaintiff. This is a double plea. Two distinct issues are raised by it. A number of facts might have been pleaded to shew that the defendant had no interest, and that would not make the plea double; in the same way as to the possession of the deeds, but the defendant cannot in one plea raise the two defences. The plea embraces two distinct grounds of equity. In *Ray v. Marshall* (n) it was held necessary to obtain leave to plead double. The plea only traverses that portion of the fourteenth paragraph of the bill which refers to deeds and instruments; but does not deny that the defendant has other documents in his possession, whereby the truth of the matters alleged in the bill would be shewn. The plea excepts out of the bill the equity on which the bill rests, and thereby becomes a plea to a bill in which there is no equity. The plea should have excepted only the subsidiary allegations tending to shew the truth of the equity. There is no averment that the professional confidence was reposed in the solicitor by his client; the mere fact of a solicitor having obtained information is not enough. *Mitford on Pleading* (o), 1 *Smith's Ch. Pr.* (p), *Denys v. Locock* (q), *Harris v. Harris* (r), *Wood v. Strickland* (s).

(a) 1 <i>Anstr. Ex.</i> 59.	(b) <i>Ib.</i> 97.
(c) <i>ps.</i> 276, 281, 335, 345, 360 <i>n</i> (h.)	(d) <i>p.</i> 632.
(e) <i>ps.</i> 506, 509, 562, 573, 588.	(f) <i>p.</i> 152.
(g) 1 <i>Ves. Sen.</i> 426.	(h) 3 <i>Drew.</i> 160.
(i) 12 <i>Sim.</i> 253.	(k) 4 <i>Beav.</i> 554.
(l) 1 <i>Johnston</i> 320.	(m) 6 <i>Ves.</i> 586.
(o) <i>p.</i> 344.	(p.) <i>p.</i> 457.
(r) 3 <i>Ha.</i> 450.	(n) 1 <i>Keen</i> 190.
	(q) 3 <i>M. & Cr.</i> 205.
	(s) 2 <i>V. & B.</i> 153 <i>n.</i>

Milford in reply. The plaintiff did not refer in his interrogatories to any documents by which the truth of the matters in the bill would be shewn, except the deeds and instruments which have been traversed in the plea, and therefore no answer was required. In this plea the whole equity is not excepted, only that part of the bill which requires discovery as to whether there is any interest. The interest alleged to be claimed by the defendant is not the whole of the equity on which the bill rests. The defences raised by the plea are to distinct portions of the bill, and therefore the plea is not double. *Mitford* on Pleading (a).

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His Honor gave judgment as follows:—

The plea in the present case is very similar to that of *T. K. Bowden* (b), argued before me a few days since

(a) *ps.* 223, 345 n (1).

(b) The plea of *T. K. Bowden*, one of the defendants in the present suit, was argued before his Honor the Primary Judge, on the 1st November, by *Milford* for the defendant *Bowden*, and *Gordon* for the plaintiff.

His Honor delivered the following judgment:—It is clear that the defendant, *T. K. Bowden*, is not a proper party to the suit, simply by reason of his having those deeds and instruments mentioned in the third paragraph of the bill in his possession, for in that case he would only be a witness, and might be called upon to produce them by a *subpoena duces tecum*. The plaintiff, however, states that the said defendant has not only these deeds in his possession, but claims to have an interest in them, and this makes him a proper party.

The defendant, if he has no interest in these deeds and instruments, may in this suit refuse to discover what they are, or to deliver them up, because he is not a proper party to it, and may therefore plead that he has no interest in them, and this is a good defence brought to one point to all the discovery and relief sought against the defendant by the bill. It is, however, a negative plea, simply denying the equity which the plaintiff sets up in this bill as a ground for the relief and discovery sought for by him. The rule is, that such a plea must be accompanied by an answer denying all the circumstances mentioned in the bill which may tend to prove the existence of such equity. The possession of the deeds and instruments tends to prove that the defendant is interested in them, and such possession should therefore be denied by the answer as it is; so the possession of drafts or copies of deeds, accounts, memoranda, letters, books, papers, or writings, if the defendant is called upon to answer whether he has them in his possession, tends to the same proof, and should also be denied by answer in like manner.

The plea in this case brings the matter to one point, viz., whether the defendant is or is not interested in the deeds and instruments; but the defendant submits to discover whether he does or does not claim an interest in the deeds and instruments, and whether they are in his possession, and (what I do not well understand) the relief sought against him as to the delivery of them up. Now a defendant by a plea insists that he is not to be compelled to answer what is covered by the plea; yet in this case he submits to answer whether

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in this suit. The bill is the same, and the present plea is as follows:—To so much of the said bill as seeks any relief or discovery from the defendant, save and except the discovery whether he claims any interest in the deeds or instruments in the bill named, does plead in bar thereto, and for, by, and by way of plea says, that he does not claim, and never has claimed any interest in the said deeds or instruments, and that any knowledge of, and concerning, or possession of the same in him was acquired through the confidence reposed in him as attorney of one Mr. Jones, and this defendant not waiving his plea for answer to the residue of the plaintiff's bill, not herein before pleaded to, denies that he claims any interest in the deeds and instruments in the bill mentioned.

I have no doubt, from the examination of the cases decided on the validity of negative pleas, and the answers

or not he is interested in the deeds and instruments, and does in fact so answer by denying that he claims any interest in them—the very plea itself. This, before the 9th order of the consolidated rules as to pleas and deinrurers, would clearly overrule the plea; and I do not conceive that the relaxation of the original practice contained in that order applies to a case where the defendant deliberately says that he will answer, and does in fact answer, to the whole equity claimed by the plaintiff. The rule is confined to cases where the answer extends to some part of the matter covered by the plea; *Emmett v. Michael*^{*}, *Ikey v. Carlise*. [†] The case of *Denys v. Locock*. [‡] was relied on for the plaintiff, but in that case the defendant excepted a matter stated in the bill from the operation of the plea, and the answer did not deny the matter so stated in the bill, so there was no issue as to that matter. In this case it does, and reiterates the plea; but as the question now is confined to the plea, it may perhaps be held that there is no issue joined on the fact of the defendant claiming an interest in the deeds and instruments, as was held in that case. I however need not consider whether *Denys v. Locock* governs the present case, for it appears to me that the answer has overruled the plea, which is sufficient ground for my present decision.

Again, the plaintiff requires discovery as to papers and writings relating to the matters mentioned in the bill, whether they are in the defendant's possession, and what are the contents, dates, &c., of them. Now, if the defendant has any of these deeds, papers, or writings in his possession that would tend to show that he was interested in the deeds and instruments mentioned in the third paragraph of the bill—for instance, if he had a copy or draft of one of the instruments mentioned in the third paragraph of the bill, such might be the inference, and if so, the interrogatory making this inquiry should have been answered.

I think, therefore, the plea is bad; but, as in fact, the interest of the defendant in the deeds and instruments mentioned in the third paragraph of the bill is denied both by plea and answer, let the plea stand as part of the answer with liberty to accept.

The plaintiff is to have the costs, to be taxed.

* 9 Jur. 170.

† 1 De Gex. Sm. 396.

‡ 8 My. & Cr. 205.

required to support them, that the rule is that you must answer all the circumstances which lead up to the equity alleged in the bill, and denied by the plea, but that you must not deny by answer the equity itself relied on, for that is put in issue, on the oath of the defendant, by the plea; *Dearman v. Wych* (a). Therefore, in stating what the plea is to be applied to, you must not accept the equity itself, but only the circumstances leading to the establishment of the equity, and these you must answer.

In the present case the equity alleged by the bill is that the defendant is interested in the deeds and instruments mentioned in the third paragraph of the bill, and the defendant says that he pleads to all the bill except the discovery of whether he has an interest in these deeds and instruments. He then pleads that he has not such interest, and then he answers that he has not such interest.

It appears to me that the defendant should not have excepted the discovery of what interest he had from the effect of the plea, and if it was not excepted from that effect, of course he need not have answered it. The plea raised that issue—and on the defendant's oath, there are no attendant circumstances excepted out of plea which lead up to the alleged equity, and there are no averments in the plea itself. Then what was the consequence of this exception out of the operation of the plea and consequent answer? It was decided in the case of *Thring v. Edgar* (b), which was a creditor's suit with a plea alleging that there was no debt due to the plaintiff, that "the defendant as much overruled his plea by answering to the debt as he would have overruled it by answering to any other part of the bill." I am not aware that the proposition so laid down in that case has been overruled. The Lord Chancellor, in the case of *Denys v. Locock* (c), says that the plea and answer in *Thring v. Edgar* were not strictly speaking to the same matter, and therefore the answer should not have been held to overrule the

(a) 9 Sim. 570.

(b) 2 S. & S. 274.

(c) 3 My. & Cr. 205.

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plea; and upon looking into the case it will be seen that the plea denied the debt to be due, but the answer denied it to be due for a particular matter; and I apprehend that the Lord Chancellordid not quarrel with what had been laid down as law in *Thring v. Edgar*, but intimated that the plea and answer were not, in his opinion, to the same matter, and therefore that answer did not overrule the plea. Sir J. Wigram certainly argues that where the answer is to the same matter as the plea, the plea is not overruled,because the defendant will not by answering give any discovery of matter, which by his plea he declines to answer. If it were not for the case of *Thring v. Edgar*, and the decision of the Judge there, I should hesitate long before I could venture to differ from the opinion of Sir J. Wigram, though only expressed in a treatise; but I must think that if a defendant first denies a matter by his plea, and then by his answer, the answer must overrule the plea, because the plea amounts to an assertion that the defendant will not answer, and yet he does.

Supposing I am wrong in this view of the present case, it appears to me to be governed by the case of *Denys v. Locock* (a). It is true that the plea and answer in that case were not exactly the same. The case made by the bill was that a person had made a promise to a testator to apply a sum of money for the benefit of another person if he, the testator, would execute a certain codicil to his will, which was done, relying on the promise, and the bill claimed the sum of money. There was a plea supported by an answer. The plea excepted from its operation those parts of the bill which led to the execution of the codicil, amongst others the promise, and it also excepted the execution of the codicil, and the defendant submitted to answer, and did answer to these matters. The plea was confined to the denial of the promise, nothing being said as to the execution of the codicil. The issue, if any, however, was joined on the question of promise or no promise, and the same thing was denied by the answer. I was mistaken,therefore,in

(a) 3 My. & Cr. 205.

the judgment I delivered on *Bowden's* plea, in supposing that the answer in *Denys* and *Locock* did not deny the plaintiff's equity, for the equity arose from the promise, not from the execution of the codicil. That case, therefore, appears to me to be exactly like the present. The equity in each case was excepted out of the plea, and yet was pleaded to exactly in the words of the answer. In *Denys v. Locock* it was held that the plea was bad, because the equity being excepted out of the plea, there was no issue joined upon the plea. So here the defendant excepts out of the plea the discovery whether he claims any interest in the deeds, therefore there is no issue raised by the plea and bill upon that, and the plea is bad.

One of the circumstances which tend to establish the equity of the plaintiff, viz., the possession of deeds, papers, and writings by the defendant, is alleged in the bill; but it is said that the defendant is not bound to answer as to them, because it is not stated that the discovery of them or their contents would tend to establish the truth of the facts stated in the bill, and the cases of *Thring* and *Edgar* and *Pennington v. Beechy* are favourable to that view of the law. Sir J. Wigram, however, in page 143 of the second edition of his work on discovery, says it is not necessary in order to entitle a plaintiff to particular discovery, that a fact should be charged in any particular form of words where the fact is in its nature such as to make it proper that an answer should be given, and he enters into an elaborate discussion of the question. Now, in the present case, the possession of the deeds and papers is a fact, the nature of which tends to show the plaintiff's alleged equity, and therefore should have been excepted out of the operation of the plea and answered.

Another objection to this plea is, that it is double, saying that the defendant does not claim any interest in the deeds and instruments in the bill mentioned, and that any knowledge of, and concerning, or possession of the same in him, was acquired through the confidence reposed in him as attorney of one *John Jones*. The second part of this plea I am disposed to think is in law

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no defence to the bill, for the attorney of *John Jones* cannot, I conceive, shelter himself under the plea of professional confidence due to him, unless *Jones* himself would be protected from the discovery of these documents, and there is nothing to show that he is so protected. This may not be quite clear, but see *Volant v. Soyer* (a), *Doe v. Langden* (b), *Spenceley v. Schulenburgh* (c). The plea, however, puts in issue two matters—the first, whether the defendant has any interest in the documents; the second, whether he has any knowledge of them, or the possession of them, except by reason of professional confidence. There are two distinct grounds for refusing to answer the bill. The plea is pleaded to the whole bill, except as to the discovery whether the defendant is interested in the deeds and documents. Supposing the exception removed, and the plea to stand alone without the exception or answer to it, then it says the defendant need not answer because he is not interested in the documents; and again, as another reason, because his knowledge or possession arises from professional confidence alone. On these assertions two issues are tendered, and if either be found in favour of the defendant, it may be a ground to excuse his answering, or the delivering up the document. If the exception from the operation of the plea remains, which only applies to discovery, the plea equally applies to the whole relief sought, and so is double. It says that the plaintiff cannot have the deeds delivered up—firstly, because the defendant is not interested in them; secondly, because he has them in his possession by means of professional confidence.

I am then urged to allow the amendment of the plea; but, although the rule as to the amendment of a plea is that "it is allowed where there has been an evident slip or mistake, and the material ground of defence appears to be sufficient, the Court being told what the amendment is to be and how the slip happened," yet this is not allowed where there is a plea supported

(a) 13 Comm. B. 231.

(c) 7 East 357.

(b) 12 Q.B. 711.

by an answer; *Thompson v. Wild* (a), *Freeland v. Johnson* (b).

I think I am bound to follow the case of *Thompson v. Wild*, and to refuse permission to amend in this case, and I have the less reluctance to do this from the recent tendency of all the Courts to enforce discovery.

I make the same order as in the case of *T. K. Bowden's* plea.

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SEMPILL *against* CAMPBELL.

Nov. 22, 23.
Dec. 2, 6, 9,
16, 20, 21.
Feb. 1, 3, 14.

THE bill in this case was filed by *Richard Hamilton Sempill* as the official assignee of the joint and separate insolvent estates of Messrs. *Garland* and *Bingham*, formerly carrying on business in Sydney as stock and commission agents and general merchants, against *Alexander Campbell*, their agent, employed by them as liquidator to wind up their partnership transactions.

It stated that the partnership of *Garland* and *Bingham* existed in the year 1860, and being in difficulties in the beginning of that year, the partners employed the defendant to liquidate their estate, and to divide the same amongst their creditors in equal proportions on payment of a commission of $2\frac{1}{2}$ per cent. on all moneys received by him, and $1\frac{1}{2}$ per cent. on all payments made by him, including renewals of bills and notes. That the defendant had full power given him by *Garland* and *Bingham*, and in January, 1860, took possession of the estate and books belonging to it, and acted as such liquidator during the year 1860. That Messrs. *Garland* and *Bingham*, with the concurrence of the defendant, caused the following advertisement to be inserted in the daily papers and the *Gazette* :—

“ Dissolution of Partnership.—The partnership heretofore existing between us, the undersigned *James Garland* and *Edward Bingham*, of number one hundred and fifteen, York-street, in the city of Sydney, as merchants and commission agents, under the firm of

If estate insolvent, liquidator (without special instructions) bound to pay rateably. If solvent, he may pay as the debt fall due, in full. If doubtful whether solvent, he is bound to pay rateably.

(a) 5 Madd. 82.

(b) 1 Aust. 276.

A. and B.
being em-
barrassed
dissolved
partnership,
and appointed
C. to wind up
their affairs in
liquidation,
and pay the
debts as they
fell due.
C. paid some
of the debts
in full, and
some he did
not pay at all.
Ultimately
the estate of
A. and B. was
sequestrated,
and D., the
official as-
signee, filed
his bill
against C. for
an account,
and charging
that he ought
to have paid
the debts
rateably.
Held that D.
did not repre-
sent the credi-
tors, but only
A. and B.

Held, that
under his in-
structions C.
was not bound
to pay rate-
ably.

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Garland and Bingham, has this day been dissolved by mutual consent. Mr. *James Garland* retires from the business, and Mr. *Edward Bingham* will continue to carry on the business of a commission agent and agent for the sale of agricultural implements solely on his own account. We have appointed Mr. *Alexander Campbell*, of No. 10, Sydney Exchange, to wind up the affairs of our late co-partnership, who alone is authorised to sign the firm of *Garland and Bingham* in liquidation.

"All persons, therefore, who are indebted to the said firm, are requested to pay the amount of their respective debts to the said *Alexander Campbell*, and all persons having any claims upon the said firm are requested to forward the same to him for examination and liquidation.

"Dated this twentieth day of January, in the year of our Lord one thousand eight hundred and sixty.

"*James Garland*,
" *E. Bingham*.

"Witness—*William Spain*, solicitor, Exchange, Sydney."

That the defendant stated to several creditors, contrary to the fact, that the estate was solvent, and that after payment of all debts there would be a large surplus, at the same time knowing the untruth of the statements, and for the purpose of preventing the creditors placing the estate in the Insolvent Court, and so enabling the defendant to receive his commission. That, on the 27th of March, 1860, *Garland and Bingham* executed a power of attorney to enable the defendant to carry out the liquidation.

The bill then charged that the defendant, on accepting the office of liquidator, took upon himself a trust irrevocable for the benefit of *Garland and Bingham*, and also for the creditors, to pay the creditors their debts *pari passu*; and that it was the duty of the defendant to ascertain the real position of the estate as to whether or not it was insolvent, and before payment of any creditor in full, to ascertain whether the estate would pay 20s. in the pound to all the creditors. The bill then stated that the defendant, knowing the estate to be insolvent, paid several creditors in full, thereby giving them a fraudulent preference. That at the time the defendant took upon himself the office of liquidator, and paying the debts as aforesaid, the estate was insolvent. That in consequence of the actings of the defendant

many of the creditors have received only a small portion of their debts. That the defendant improperly retained the sum of £4,710 19s. 2d. for alleged commission, and released some debts due to the firm, and in particular a debt due from a person named *Perry*. That the joint and separate estates of *Garland* and *Bingham* were sequestrated on the 15th of March, 1861, and the plaintiff appointed official assignee.

The bill prayed for an account of the assets of *Garland* and *Bingham* received, or which might have been received by the defendant, and of his disposal thereof, and that the assets and liabilities of the firm at the time the defendant began to act as liquidator might be ascertained. An account of all sums of money received by the defendant for commission, and of all sums of money paid to creditors in excess over their rateable proportion of the assets. That upon taking these accounts the defendant might be decreed to pay to the plaintiffs all sums which might be found to have been lost through the negligence of the defendant, or improperly released by him, and all sums appropriated to his own use, and all sums found to have been paid to creditors over and above the sums to which they were entitled rateably with the other creditors.

The defendant put in an answer and claimed his commission, and contended that he had acted in strict accordance with his duties as liquidator, and that when he took on himself that office the property of the partnership and the partners was sufficient to pay all the creditors, and that he was not accountable to the creditors of the estate for his management of it; and he said that the plaintiff had no right to the relief prayed, and that the bill should be dismissed with costs.

The defendant in his evidence gave the following statement of the arrangements between him and *Garland* and *Bingham* :—

“ Early in the month of January, 1860, the affairs of the firm of *Garland* and *Bingham*, then carrying on an extensive business as stock and station agents, became embarrassed, and I was strongly urged to afford them

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some assistance, with a view to relieve them from difficulties which their friends supposed to be merely temporary. Mr. *Garland's* station property was estimated as worth £30,000; the business was represented as very profitable, and it was known that the firm had large valuable assets which could easily be converted to meet its engagements. At that time the books were not posted up, and it was therefore impossible to ascertain the exact position of the firm. I examined into their affairs as well as I could under the circumstances, and very soon came to the conclusion that the affairs of the firm were temporarily deranged, and that there was no hope of setting matters right unless the business was stopped, and the affairs wound up in liquidation. On my advising this course and the immediate dissolution of the co-partnership, I was urged to undertake the liquidation, on the understanding that banking facilities could be procured to enable me to wind up the affairs successfully. The firm had transacted the greater part of its business with the Commercial Bank, and I applied to the manager of that institution to know if the directors would be disposed to afford discounting accommodation to wind up the estate. The directors, after due consideration, very liberally offered me these facilities to the extent of £45,000, provided I would undertake the liquidation, at the same time expressing their confidence in the mode by which I proposed to conduct it. I then agreed to act for the firm under a power of attorney, in pursuance of an agreement to pay me a commission on the sums actually paid and collected. On the 21st January, 1860, the co-partnership was dissolved; the management devolved on me by a power of attorney from the two partners. On that date the liabilities of the firm stood thus:—

Bills payable in circulation	...	...	£53,744
Liability on bills receivable	...	...	75,647
Open account due to <i>Sinclair, Hamilton, & Co.</i> , London, say	...	...	18,000
Ditto to sundry other persons	...	...	26,137
			£173,528

To meet this large amount, the only tangible asset I received was about £900 in cash on the 22nd of January. The rest consisted of about £10,000 in bills, which the firm could not negotiate ; about £60,000 due by various parties who had property to represent their debts to the firm, but for the greater portion of these debts no security was taken, and those which had been taken were in an imperfect state. Besides these assets, there were nearly £15,000 of consignments afloat to London, Mauritius, Tasmania, and about the same amount due from various debtors, in open account, not fortified by any securities ; so that not one shilling of these assets could be availed of to meet liabilities here. The produce sent to London went to reduce the debt to *Sinclair, Hamilton and Co.*; the goods at Tasmania and Mauritius had to be realised and remitted for before they could be available to meet engagements. Within three months of the dissolution I got security from every debtor to the firm who had any to give, in a legal and perfect shape. Within eight months of the time I undertook the management of the affairs, I had actually collected and paid in cash £83,547 10s. 3d., as will appear from the books of the firm ; and, since the date to which I refer (30th September, 1860), considerable sums have been received, and liabilities to a considerable amount have run off. At the present time the indirect liabilities of the firm are under £ , and the whole of these are well secured, provided the estate is kept out of the Insolvent Court. I have no hesitation in stating that had this estate been sequestered at the time it was placed in liquidation, it would not have yielded a dividend of 4s. in the £, because nearly the whole of those who owed money to *Garland and Bingham* would have been forced into the Insolvent Court ; also an immense sacrifice of property would have been the result."

The defendant gave the following account of his position :—" I was to be their accountant or managing clerk, with power to sign for the firm in liquidation, as usual in all cases of winding up in liquidation. All moneys collected, and the proceeds of all bills discounted,

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were to be paid into the bank to the credit of the firm in liquidation, and were to be drawn out by the cheques of the firm, signed by me in the same way in discharge of the firm's obligations as they fell due. I was to incur no personal responsibility whatever, and Mr. *Garland* was to take an office for the firm (and keep the books and papers there) in the Exchange, if a room could be got there, so as to be as near my office as possible." He said that either party could put an end to the arrangement at any time.

The power of attorney was dated the 27th March, 1860, and gave *Campbell* full powers of realizing their estate, but did not specify the manner in which the assets were to be distributed.

The evidence as to *Campbell's* dealing with the estate was very voluminous and conflicting.

Sir *W. Manning*, Q.C., *Isaacs*, and *Darley* for the plaintiff. The business of Messrs. *Garland* and *Bingham* consisted of making advances to squatters, and taking security from them. To effect this, they were obliged to get accommodation from the bankers. Their solvency depended on the solvency of their customers, and no examination of their books could determine this with certainty. In fact, their insolvency has been brought about by some of their customers being unable to pay. *Campbell's* appointment was by arrangement with the Commercial Bank, one of their principal creditors; and in consideration of his appointment and of the powers to be given to him—free from the control of *Garland* and *Bingham*—the bank consented to give additional accommodation. It was, therefore, impossible for Messrs. *Garland* and *Bingham* to revoke those powers, or to remove *Campbell*. The advertisement announcing to the creditors the appointment of *Campbell* to wind up their affairs made the creditors *cestuis que* trust, and also rendered *Campbell's* appointment irrevocable. The creditors allowed *Campbell* to realise the assets, and forebore to enforce their claims, trusting to his paying them. *Campbell* acted on his powers, and got in all the assets—

so that the dealings of the parties placed him in the same position as if *Garland* and *Bingham* had executed an assignment to him for the benefit of their creditors. It was his duty to pay all the creditors rateably. He should have dealt with the estate just as if it had been in fact insolvent, because it was impossible to know whether it was or not, until all the assets had been realized. *Garland* and *Bingham's* business was to cease, except for the purpose of winding up. Instead of paying all the creditors rateably, *Campbell* has paid some in full, and to some he has paid nothing; but he has retained, as commission for his trouble, the sum of £4,710. The word "liquidator" has a meaning given to it by the English Bankruptcy Act, in which the person formerly called the official assignee is called liquidator. To wind up an estate in liquidation is therefore to collect the assets, and distribute them as in an insolvent estate, *i.e.*, rateably among all the creditors. [By the Court. If one partner dies and the survivor winds up the concern, must he pay the creditors rateably?] This case is different—here, a third person has been specially appointed to wind up the estate in liquidation; but even in the case put, if it were doubtful if the estate were solvent, the partner would have to pay the creditors rateably. Here, the liquidator is placed over the heads of the partners, and is bound to act as a Court of Equity would act. [By the Court. *Walwyn v. Coutts* (a).] As trustee he has no discretion in the matter. *Lewin on Trusts* (b), *McKinnon v. Stewart* (c), *Wilding v. Richards* (d), *Cornthwaite v. Frith* (e), *Dyer v. Dyer* (f), *McFadden v. Jenkins* (g), *Giggens v. Evans* (h), *Harland v. Binks* (i), *De Tastet v. Le Tavernier* (k), *Bill v. Cureton* (l), *Books v. Parks* (m).

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- (a) 3 Sim. 14.
- (c) 1 Sim. N. S. 76.
- (e) 4 De G. & S. 552.
- (g) 1 Hare 458.
- (i) 15 Q. B. 713.
- (l) 2 M. & K. 503.

- (b) 1881, 488.
- (d) 1 C. C. C. 661.
- (f) 1 Wh. & Tu. 179.
- (h) 24 L. J. Q. B. 305.
- (k) 1 Keen 161.
- (m) 1 Moll. 465.

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Darvall, Q.C., and *Gordon* for the defendant. The duty of paying creditors rateably arises only where the estate is insolvent. When *Campbell* was appointed liquidator there was no idea of insolvency. It was only when from unforeseen circumstances the property became depreciated that any one contemplated insolvency. A liquidator stands in the place of the person whose estate he liquidates. His position is that of a mere agent, and in no way analogous to that of an official assignee of an insolvent estate. *Campbell* cannot be a trustee for the creditors, as there was no assignment to him of the property. *Campbell* paid the debts according as they fell due and as he had funds to meet them. They were so paid, not because the funds were deficient, but because they were not immediately available. So far from contemplating insolvency, it was expected that *Garland's* private estate (to the value of £45,000) would remain after all the debts had been paid in full. The Commercial Bank agreed to extend its discounts, so as to enable the estate to be wound up. If the banks were to stop their discounts, any merchant firm would be unable to carry on its business, though, if the discounts were continued, it might be perfectly solvent. No creditor complained that *Campbell* paid some of them in full. If the estate were insolvent, why did not the creditors place it in the Insolvent Court? *Campbell* is not shewn to have misappropriated any of the funds, or in any way to have injured the estate of *Garland* and *Bingham*. It is merely a question as to whether or not he was bound to pay the creditors rateably. The power of attorney did not create any trust, it only gave *Campbell* the powers he has stipulated for, to enable him to wind up the estate as the agent of *Garland* and *Bingham*. *Campbell's* appointment was by a verbal arrangement, to which the creditors were not a party. In an assignment deed, a creditor who did not execute it would have no right to enforce it. The plaintiff cannot in this suit represent the creditors, only *Garland* and *Bingham*. Any one of the creditors might sue *Campbell*, either by himself or on behalf of all other creditors standing in

the same position. *Pardessus Cours de Droit Commercial* (a), *Lindley on Partnership* (b), *Lepard v. Vernon* (c), *Dixon v. Ewart* (d), *Abbott v. Stratton* (e), *Bayley v. Scholefield* (f), *Acton v. Woodgate* (g), *Simmonds v. Palles* (h), *Browne v. Cavendish* (i), *Burt v. British Nation Life Assurance Association* (k), *Nicholson v. Tutin* (l).

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Sir W. Manning, Q.C., in reply. The term liquidate has not been used in any of the colonial Acts, but is in use among merchants, and it is evidently borrowed from the English Bankruptcy Acts, and refers to winding up an insolvent estate. The cause of the firm's dissolution was its embarrassments, and the bank refused to continue its advances unless the firm was dissolved and wound up. This is very different from a dissolution by effluxion of time or the will of the partners. All the circumstances show that there was a perfect and irrevocable trust. The Bank and the other creditors were induced to alter their position by reason of the arrangement, and *Campbell* collected and distributed the assets by virtue of it. As such trustee it was his duty to see that all the creditors were equitably dealt with, and to have avoided the risk by paying them *pari passu*. The official assignee represents the unpaid creditors of the estate of *Garland* and *Bingham*.

The PRIMARY JUDGE having recited the facts of the case as above set forth, proceeded :—

It does not appear to me that the bill is framed so much with the view of obtaining relief by the creditors as *cestui que* trusts, as by the plaintiff representing *Garland* and *Bingham*, and calling on the defendant as their agent to account. Indeed, I do not see how the plaintiff as official assignee can represent the *cestui que* trusts, if, indeed, any creditors acquired that status by virtue of the arrangement made between *Garland* and *Bingham* and the defendant, and the advertisement or

(a) Part 5, title 4, s. 1, par. 1073-4 (1)-4 (a)-5.	(c) 2 V. & B. 53.
(b) pa. 332-3, 685, 862-5, 1158.	(e) 8 J. & L. 613.
(d) 3 Mor. 327.	(g) 2 M. & K. 492.
(f) 1 M. & S. 350.	(i) 1 J. & L. 635.
(h) 2 J. & L. 489, p. 503.	(l) 2 K. & J. 18.
(k) 4 De G. & J. 158.	

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other communication made to them. Any *cestui que* trust who has a ground of complaint, might file his bill against his trustee; but the official assignee of the estate of *Garland* and *Bingham* can have nothing to do with that. The bill, however, calls upon the defendant to account as the agent of *Garland* and *Bingham*, whose right of suit has become vested in their official assignee. The plaintiff says that the defendant has received assets, and has misapplied them, whereby *Garland* and *Bingham*, and consequently their creditors, or some of them, are injured. If the defendant has paid one creditor £100 more than he ought to have done, that would have gone, if not so paid, to increase the assets at the time of the insolvency, and be distributable amongst the creditors of the estate generally. The plaintiff can clearly sustain the bill, and there must be a decree to account; but the question is, how the account is to be taken, which involves the question as to what was the duty of the defendant, and whether he has performed it; and the result must, of course, tend to regulate the payment of the costs of the suit.

As the defendant is answerable as agent, the first inquiry is as to what his authority was? Even if this were a suit by the *cestui que* trusts, or any one of them, that would be the first inquiry; for the defendant, by communicating his appointment to act to the creditors, could only have been constituted a trustee for them to the extent that the authors of the trust directed him to act; but, as it is a suit by the principal against the agent, it is quite clear that the plaintiff has no claim against the defendant, unless the latter has acted beyond or contrary to the trusts reposed in him.

In this case a good deal must depend upon what is the duty of an agent called a liquidator, for, as he may be appointed without a communication with the creditors, he is the agent of the person appointing him, and of such person only. It is no doubt his duty to wind up an estate, but the mode of winding up must depend upon the nature and condition of the estate put into his hands. The duty of a liquidator of an insolvent estate would not

be the same as that of an estate having sufficient assets at once available to the payment of the debts owing by the estate. In the former case the liquidator would have to wind up all outstanding transactions, and, if necessary, to make compromises and arrangements with debtors and creditors of the estate, to receive all money thereupon coming to the estate and all debts due to it, and to retain the assets so collected for distribution when the estate should ultimately be wound up. The duty of a liquidator of a clearly solvent estate would be very different; he would, out of any assets which he might have or collect, pay the debts owing by the estate as they should fall due, and pay the surplus in his hands when everything had been received and paid to his principal. In case it is doubtful whether an estate put into the hands of a liquidator is solvent or not, it is his duty to look to the possibility of the injury he might do to the creditors by treating the estate as a solvent estate, and, in consequence, he should not undertake to pay any claim till he could with certainty know that he would be able to pay all.

What I have said, however, refers to the appointment of a liquidator to wind up an estate without special directions from his principal, for when there are special directions, of course, as between him and his principal, he must follow them. It becomes, therefore, of the first importance in this case to see what the authority given to the defendant by *Garland* and *Bingham* was.

The proof of this must chiefly be gathered from the account given by the defendant and *Garland* of the conversations which took place in January, 1860, on the subject; of course, however, explained in any doubtful or contradictory statement by other evidence, either by acts of the parties, or written statements subsequently made, and especially by the power of attorney executed by *Garland* and *Bingham* on the 27th of March, 1860.

All parties agree in saying that they believed that the estate was solvent in January, 1860, but that owing to debts owing to the estate not being payable till after debts owing by the estate would become payable, the

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assistance of increased discount by a bank was required. If that could not have been obtained, it is clear that the estate must have gone into the Insolvent Court, as the debts owing by the estate could not be paid as they should fall due. The Commercial Bank fearing that the business was not properly conducted refused assistance. It would seem that at this time, supposing the persons owing money to the firm to be able to pay their liabilities, the assets amounted to about £69,000, exclusive of the private property of the partners, and the debts to about £48,000, together with about £30,000 or £40,000 of contingent liabilities. The evidence of the parties concerned in the arrangement, and the statement made by the defendant for, though not to, the creditors, in February, 1861, point out that the securities which the partnership had were by no means safe, and the money due to the estate did not come in as was expected. That statement made by the defendant must, as against him, be taken to be correct.

Now, if the defendant under these circumstances had in January, 1860, been appointed liquidator to wind up the estate, without special directions, I do not think he would have been justified in paying some creditors till he was sure of being able to pay all. But what were the actual instructions which he received from *Garland* and *Bingham*? for by those, as between him and the present plaintiff, his duty is pointed out. If the defendant has acted in conformity with those instructions, although he may have made payments which he ought not to have made, and performed other acts rendered void by the Insolvent Acts, he is not liable for them, they must be considered as having been done by *Garland* and *Bingham* and not by him—he was only their agent. What then were the authority and instructions given to the defendant by *Garland* and *Bingham*?

Mr. *Bingham*, who was not present at all the conversations by which the arrangement between the defendant and the partnership was made, represents it as constituting the defendant the uncontrollable and irrevocable liquidator of the estate; but he does not

appear to be aware of any particular instructions being given beyond this.

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Mr. *Garland* says the arrangement ultimately come to was, that the defendant was to manage the affairs of the firm, and to receive and pay moneys on account of the firm, signing *per pro Garland* and *Bingham* in liquidation. The firm was to be dissolved—Mr. *Bingham* was to carry on that portion of the business which he was conducting (the agricultural implement business). He (*Garland*) was carrying on a little agency business, which did not require any outlay of capital until the affairs of the firm were wound up. The Commercial Bank approved of that arrangement, altered the relations of the Bank to them, agreeing to extend the discounts under Mr. *Campbell's* management. The general creditors of the firm had nothing to do with this arrangement, except the Commercial Bank.

The defendant says that the arrangement was, that he was to be their accountant or managing clerk, with power to sign for the firm in liquidation, as usual in all cases of winding up in liquidation. All moneys collected, and the proceeds of all bills discounted, were to be paid into the bank to the credit of the firm in liquidation, and were to be drawn out by the cheques of the firm, signed by him in the same way in discharge of the firm's obligations as they fell due. He was to incur no personal responsibility whatever, and Mr. *Garland* was to take an office for the firm (and keep the books and papers there) in the Exchange, if a room could be got there, so as to be as near his office as possible. He says that either party could put an end to the arrangement.

The power of attorney, executed by *Garland* and *Bingham* on the 27th of March, 1860, expressly confirms all acts done by the defendant up to that time, and appears to specify all acts that could be necessary for realising the estate, but not one word is said as to the remuneration of the defendant, or as to the way in which the debts were to be paid; whether *pari passu*, as they became due and were demanded, or at the discretion of

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the defendant, so that the former arrangement made in January must be considered as remaining unaltered.

Neither Mr. *Garland* nor Mr. *Bingham* say anything about the important provision that the defendant was to discharge the firm's obligations as they became due; but they do not deny that this formed part of the arrangement, and the defendant swears that it did. There is sufficient evidence that Mr. *Garland* was aware of the fact, that the liquidation was conducted by the defendant on that principle without objection. Mr. *Bingham* does not appear to have taken any part in the affairs of the liquidation after the arrangement with the defendant. This, then, being the principle upon which the liquidation was to be conducted according to the agreement between the defendant and the insolvents, the present plaintiff cannot find fault with the defendant having carried it out if he has done so, but as the plaintiff so requires it must be the subject of an investigation before the Master. If it should turn out that the defendant has acted otherwise than he was authorised by the power granted to him, he may be liable to the plaintiff for what has been lost by his mismanagement, but that will appear by the result of the investigation, and will form a subject for future consideration. I declare that by the agreement between the defendants and *J. Garland* and *E. Bingham*, the defendant was authorised, on and after the 20th January, 1860, to collect the assets of the late firm of *Garland* and *Bingham* in the manner pointed out by the power of attorney of the 27th March, 1860, and to discharge the obligations of the firm as they fell due, and to retain a commission of $2\frac{1}{2}$ per cent. on all money that should be received by him, and $1\frac{1}{2}$ per cent. on all payments to be made by him, including renewals of bills and notes; and I refer it to the Master to inquire what were the assets and liabilities of the partnership firm on the 20th of January, 1860, and to take an account of the receipts of the defendant, as liquidator of the estate of the said firm, and of his application thereof on that footing. Of course the Master will have power to make any separate report and to state special

circumstances. This power appears to me to be very likely to be exercised with respect to the arrangement with *Perry*, the non-payment of *Sloper Cox*, and *Hamilton and Co.*, the *Dights*, and other creditors. However, this is altogether for the Master. I reserve the consideration of costs and further directions until after the Master shall have made his report, and all parties are to be at liberty to apply as they may be advised.

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THIS was an appeal to the full Court from the judgment of his Honor the Primary Judge, granting the injunction prayed for in the bill. The bill was filed by the Melbourne and Newcastle Minmi Colliery Company (Limited) against *Harold McLean* (the sheriff of the colony of New South Wales), and the Waratah Coal Company; and stated that the plaintiff was a corporation under the name of the Melbourne and Newcastle Minmi Colliery Company (Limited), carrying on business at Melbourne; that the Waratah Coal Company had brought an action at common law against one *Charles Robertson*, as agent of a certain company or co-partnership, carrying on business at Newcastle under the name of the Melbourne and Newcastle Minmi Colliery Company, and obtained a verdict; that under the writ of *fi. fa.* issued in that case, the defendant (*Harold McLean*) had seized, and was about to sell, the plant, stock, and machinery of the plaintiff. It charged that the Waratah Coal Company had never brought any action, or obtained any verdict against the plaintiff, and that if the sale were to be proceeded with, irreparable injury would accrue to the plaintiff. The bill prayed for an injunction to restrain the defendant (*McLean*) from selling under the said writ, or any other writ issued or to be issued in the said action, the plant, stock, and machinery of the plaintiff;

(a) Coram, full Court.

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and to restrain the defendant (the Waratah Coal Company) from compelling *McLean* to sell.

After the Primary Judge had granted the injunction prayed for, the defendants moved before the Primary Judge, upon further evidence, that the injunction might be dissolved, and the plaintiff ordered to pay into Court the amount for which the execution in the said action had been issued.

Darley and *Owen*, for the plaintiff, objected that the defendant could not move to dissolve an injunction before the same Judge as granted it, unless some new facts were proved; otherwise, a defendant having supplemented the defects in his case would be able to have a re-hearing of his case. *Drewry* on Injunctions (a).

Gordon and *Isaacs*, for the defendants, cited *Cost v. Burr* (b), and *Newlands v. Paynter* (c); and contended that the further evidence did disclose new facts.

His Honor, without calling upon the counsel for the plaintiff, dismissed the motion upon the merits, and intimated the opinion that the further evidence adduced did not disclose any new facts.

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On this day, the cause was argued before the full Court, on appeal from the order of the Court below granting the injunction.

The facts of the case and the evidence are fully set out in the judgment of their Honors.

Gordon and *Isaacs* for the appellants. The grounds of this bill are merely technical, and cannot be allowed to override the equities of the case. It is clear that the plaintiff in this suit, and the defendant in the common law action, are substantially the same; and it is admitted

(a) p. 427 n. (a).

(b) 2 Russ. 161.

(c) 4 M. & Cr. 408.

by the letter of the agent of the company that the debt is due to the Waratah Company by the plaintiff. The plea of being a corporation was pleaded at the common law action, and subsequently withdrawn. The plaintiff knew that it was intended that the common law action should be against them, and that it was so considered. The agent sued under the Absent Defendants' Act is still the agent of the plaintiff. The plaintiff has, by his acts, confirmed the proceedings intended to have been taken against him in the action. The Court of Equity will not interfere where there is an adequate legal remedy. If the plaintiff suffers any injury by the sale, it will have arisen from his own fault in not paying the debt admitted to be due by him. The sheriff is the officer of the Court, and Equity Courts will not interfere with the officer of another Court acting under its authority. *Lindley* on Partnership (a), *Meggitt v. Schuster* (b), *Cost v. Burr* (c), *Newlands v. Paynter* (d), *Jackson v. Stanhope* (e), *Roberts v. Maddox* (f), *Bateman v. Willow* (g).

Darley and *Owen* for the respondents. The ground of equity on which the plaintiff claims this injunction, is that irreparable will ensue unless it be granted. The Court of Equity will always interfere in trespass upon mines. There is no legal remedy adequate to compensate the plaintiff for the loss of his machinery, and the consequent destruction of his trade. The fact of a debt being due by the plaintiff has never been proved, as no verdict was obtained against him, and even if admitted to be in fact due would not authorise the sheriff to sell his property to pay it. The sheriff is only protected as the officer of the Court, when he keeps within the limits of his authority: when he exceeds it he is a mere trespasser. The plaintiff has never confirmed the proceedings in the action. He did not interfere with the proceedings as long as they were directed against a

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(a) 587-8.	(b) 7 L. T. N. S. 680.
(c) 2 Russ. 161.	(d) 4 M. & C. 408.
(e) 10 Jur. 678.	(f) 13 Sim. 549.
(g) 1 Sch. & Lef. 201-3.	

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stranger; but the moment they were directed against him, he applied to the Court. There has been no fraud or deceit to disentitle the plaintiff to relief. *Drewry* on Injunctions (a), *Neicell v. Townsend* (b), *Garstin v. Asplin* (c), *Newlands v. Paynter* (d).

Gordon in reply.

STEPHEN, C. J. By the affidavits filed in this matter, by which alone we must be guided,—although it is obvious that other material circumstances exist, on which information would be desirable,—the following appear to be the leading facts.

In September last, the Waratah Coal Company brought an action in this Court for goods sold, against one *Robertson*, under our local Absent Defendants' Act, as agent of a supposed unincorporated partnership, called (or supposed to be called) the "Melbourne and Newcastle Minmi Colliery Company"—the members of which, as the plaintiffs alleged, were unknown. There is no doubt that this stated co-partnership or company were intended to indicate, and in truth were supposed to be identical with, the plaintiffs in the present suit—"The Melbourne and Newcastle Minmi Colliery Company Limited." It is, however, undisputed, that *Robertson* was the general agent in this colony, or manager of the works of the corporation so called; and that the latter, subject at all events to a claim of set off, owe in fact the money sued for. The principal office of the corporation is in Melbourne, but they carry on business and own a coal mine at Newcastle; from which place Mr. *Robertson* (acting through a Mr. *Brown*, whose position is unexplained and not very intelligible), wrote to a Sydney law firm, to defend the action—giving them particulars as to the set off, which *Robertson* considered the "main" defence.

The attorneys, thus instructed, pleaded that the supposed co-partnership was a corporation; but, on some

(a) p. 184. 176. App. 28.
(c) 1. Madd. 150.

(b) 6 Sim. 419.
(d) 10 Sim. 377; S. C., 4 M. & Cr. 408.

ground not stated, they at the same time advised *Brown* that the counter claim could not, in that action, be sustained. Thereupon in October, *Brown*—who was himself suing the Melbourne Corporation, though in what form or by what name does not appear—informs *Robertson* of the opinion; and the latter, unconscious that there was on the record any plea whatever (still less any effectual legal answer), instructs the attorneys to incur no further expense. The consequence was a withdrawal of the plea; and, in November, a judgment against the supposed co-partnership,—under which the execution has been levied, that the corporation now seek to be relieved from.

The fact here mentioned, that the plea withdrawn was one asserting the corporate character of the defendants in that action, was not only admitted on the argument before us, but its withdrawal was urged on behalf of the Waratah Company, as an implied admission that the defence was unfounded.

It appears by an affidavit in support of the motion to dissolve, that when the action was commenced, and for some time afterwards, Mr. *G. R. Dibbs* was agent for the Corporation in Sydney. He now, as a witness for the Waratah Company, says that it was he (*Dibbs*) who informed the Melbourne Directors of the action having been brought; and he apprised them that, after conference with the attorneys, he did “not see that any tangible defence or set off” could be made—so that judgment would soon issue. The set off, Mr. *Dibbs* adds, though due, could only be dealt with by a separate action; and he advises a settlement, therefore, to prevent more serious consequences. The Directors answer this, by confessing that they have not means to pay the Waratah Company: but announce that they are about making a call on their members (for this is clearly in effect what they say), to enable them to do so. Immediately afterwards the plea is withdrawn, as already mentioned, by instructions from Mr. *Robertson*; and the whole mine, plant, and utensils of trade, of the corporation are levied upon at Newcastle, and advertised for sale.

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I have no doubt, under the circumstances here detailed, that the injunction in this suit was properly granted. The objection appears to me to be untenable, that, if the Waratah Company have obtained no legal judgment against this corporation, and so that the levy is altogether a trespass, the plaintiffs should be left to their remedy at law. The judgment is, in my opinion, clearly, in legal effect or operation, not one against the corporation; but the damage likely to be sustained by them, from the continued illegal possession and eventual sale of their property, would be irreparable. This Court doubtless would not interfere by injunction, in any ordinary case of trespass, or merely to enable parties to try at more leisure a question of disputed property. But here is the inevitable destruction of a trade—of (in effect though not in form) a mining partnership, with the sacrifice too of interests belonging to individuals—that is to say the shareholders, not before the Court until now. I cannot see, therefore, why the plaintiffs in this suit should be required, as a preliminary, to bring the amount of their debt into Court. If there be really a fair claim of set off, as I infer legitimately from the affidavits that there is, it ought to be tried. Nor can I discover any equity against the plaintiffs, depriving them of their right to be impleaded, according only to the rules of law. There is nothing to show that the directors knew, or were told, that the "corporation" was really not sued. On the contrary, they would naturally suppose from the terms of *Dibbs*' letter (set out in paragraph 8 of his affidavit), that the action was against the corporation—or, at least, against that Company "*Limited*," which the directors represented; while the same communication led them to believe, contrary to the fact, an unanswerable plea being then actually on the file, that to that action there was no tangible defence.

The Waratah Company, moreover, before they commenced proceedings at law (see Mr. *Stable's* last affidavit, 3rd paragraph), knew from the Melbourne directors the style or title of the corporation, or company, whatever it may have been then supposed to be. And if the defendants, being thus put on inquiry, were led to a wrong conclusion as to the fact which that title indicated, they assuredly have no equitable claim to throw the consequences of their mistake, however pardonable in itself, on their adversaries. On every ground, therefore, this appeal must, I conceive, be dismissed with costs.

MILFORD, J. When the motion to dissolve the injunction in this case came before me as Primary Judge, I did not hear the whole of the argument—leaving it to be disposed of by the full Court; but the opinion I then formed remains unchanged. I think the injunction should not be dissolved.

The Melbourne Company is in fact a corporation, and can only be bound, or bind itself by the means pointed out by law for that purpose. A corporation can certainly appoint an agent, and would be bound by acts done by him within the scope of his authority, but no member of the corporation could bind the corporation; he could not affect the corporation by acquiescence, nor could any act of his estop the corporation from claiming such rights as it might have.

There cannot be a doubt in the present state of the law but that if A. had obtained a judgment and issued execution thereon against B., and should attempt to enforce it against the mining machinery of C., an injunction would on the application of C. be granted, and the circumstance that C. owed A. a debt would make no difference. The owing a debt is no reason why the debtor's machinery should be taken in execution. If instead of mining machinery the goods to be taken in execution were furniture or cattle, the Court (except under special circumstances) would leave the aggrieved party to his remedy at law; but as irreparable injury might, and as in the present case is sworn would be inflicted, the Court would without doubt interfere. It is no less an irreparable injury, because the injured party may, if he has got the money, buy the trespasser off by payment of a sum of money. The debt does not justify the trespass.

In order that the corporation should in this case be deprived of this right to an injunction, the defendants (the Waratah Coal Company) must establish some right which this Court will consider as effective for that purpose. I am unable to discover any such right.

It is not alleged by affidavit, or pretended in argument, that the corporation has been guilty of any fraud. The utmost that can be laid to its charge is, that it has allowed the Waratah Coal Company to obtain a judgment against a company or co-partnership bearing a name very similar to that of the corporation, knowing that the corporation was intended by the Waratah Coal Company to be the real defendants.

The agent for the corporation, having some authority, but to what extent does not appear, was the same person

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who had the control over the proceedings of the company, the defendants in the action; but he never defended it for the corporation, which was not a party to the action. I do not know that even if he had full authority for that purpose it was his duty, or the duty of the corporation itself to say to the Waratah Coal Company, "We know you intend to sue us, but you have made a mistake; you are suing the wrong persons." Even if there had been such a duty incumbent on the corporation or agent, the attention of the Waratah Coal Company was drawn to the fact by the name of the corporation being used on one occasion, and by the plea that the defendants in the action were a corporation being put on the file. In fact, the agent for the plaintiffs in the action did make enquiries on the subject. Again, it is said that, inasmuch as the corporation stood by and allowed judgment to be obtained against the company or partnership, it is bound to give effect to it. Be it so. The corporation does not find fault with the judgment, or wish to set it aside, but objects to goods which belong to the corporation, not to the defendants in the action, being taken. A party standing by and allowing an act to be done may be bound to give legal effect to that act, but nothing more. If the corporation had allowed judgment to go against itself, it would have been obliged to allow all its consequences, but it has not done so.

Again, the withdrawal of the plea by the defendants in the action (with the knowledge of the corporation), which plea would have been a valid defence to the action, is urged as a ground why the corporation should not now object to the execution issued against the defendants in the action taking its goods. This was not and could not have been done by the corporation, for it was no party to the suit. There might have been good or bad reasons influencing the person having the management of the action for the defendants in doing this. It may be that the defendants' agent in the action had become interested on behalf of the plaintiffs, or it may be that he knew a judgment in the action would be useless, and so did it; but that was not the act of the corporation. Supposing that the corporation knew that this plea was withdrawn, and that therefore it must give effect to the judgment obtained in consequence, that will only be as I have said to the judgment against the defendants in the action, the execution in pursuance of which could not affect the goods of the corporation.

Supposing that the corporation, or its agent duly authorised, had admitted that the debt claimed in the

action was due from the corporation, that would be no admission that the action was properly brought, or that it was to be bound by any judgment obtained in it.

On the whole I am unable to see any ground for dissolving this injunction.

WISE, J. It is not without some distrust of my own opinion that I find myself unable to assent to the judgments of my learned colleagues, who have had so much greater experience than myself in the application of the principles of equity jurisprudence; but after fully considering the arguments of counsel and those judgments, I am of opinion that the injunction ought to be dissolved.

A statement of the facts, as they appear in the affidavits, will I think fitly introduce and at the same time show the reasons of my judgment.

The Melbourne and Newcastle Minmi Colliery Company were carrying on business at Newcastle and Melbourne, under Mr. *Robertson*, who was called the manager, the head office being at Melbourne; but all the property of the company was near Newcastle.

The correct legal designation of the company was, at the time of the action being commenced, "Melbourne and Newcastle Minmi Colliery Company (Limited)"; but it does not seem to have borne any other name in the colony than "Melbourne and Newcastle Minmi Colliery Company," and it was so designated in an affidavit made by Mr. *Robertson* so lately as December last. The word "Limited" was indeed used in a letter of its secretary to the Waratah Coal Company, dated July 26th; but that was, as far as appears, the only allusion ever made to the corporate character of the company, and there was no public notification that they were anything else than an ordinary commercial partnership. That letter was written by the acting secretary at Melbourne, in reply to a demand of payment of the amount now sued for, and, after expressing regret that it had been necessary to apply to the head office, it stated "that the directors expect the presence of Mr. *Alexander Brown* by the first opportunity from Sydney, when doubtless some matters with regard to the financial arrangements of the company will be settled, and your account paid, and, in the interim, requesting your kind forbearance, &c., &c.

No settlement having been come to, a writ was issued on September 12, against *C. Robertson*, "as agent of a certain company or co-partnership carrying on business at Newcastle, under the name of the Melbourne and

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Newcastle Minmi Colliery Company," and, by the advice of Mr. *Brown*, Messrs. *Daintrey* and *Chapman* were instructed to defend the action.

Mr. *Dibbs* was the agent of the company in Sydney, and he states "at the time the said action was brought I was the agent of the plaintiff company in Sydney, and was informed by the said *Charles Robertson* of the said action having been commenced, and I, as agent of the said plaintiff company, thereupon instructed Messieurs *Daintrey* and *Chapman* to appear to the said action; and I thereupon wrote to the directors in Melbourne of the said plaintiff company, informing them of the said action having been brought, and requesting them to instruct me as to the defence to the said action."

About September 28, having been advised that the set-off could not be pleaded, Mr. *Dibbs* informed the Secretary of the Company at Melbourne that there was no tangible defence or set-off, and requested them to meet the demand. On the 12th of October he is informed that the directors have no means of remitting, and decline incurring any further responsibility pending a call. Thereupon, on 17th October, Mr. *Robertson* thus writes to Messrs. *Daintrey* and *Chapman*:—"As our company cannot put in as a set-off the amount claimed against the Waratah Company, I cannot see that it is of any use continuing to defend this suit, as we unquestionably owe the money. I therefore think it will be as well to discontinue any further expense in the matter." The defence, which, it was admitted upon the argument, was the corporate character of the company, was then abandoned, and judgment signed; and on the 16th November a *fi. fa.* issued, under which a levy was made upon the 25th. The sale was advertised on the 15th of December for the 22nd, and the motion for injunction was made on the 16th of December.

The affidavit of Mr. *McCarthy*, in support of that motion, stated that the action was against *Robertson*, as the agent of a certain co-partnership called the Melbourne and Newcastle Minmi Colliery Company, and that the stock of the corporation—the Melbourne and Newcastle Minmi Colliery Company (Limited)—was seized under the *fi. fa.*, and that if the injunction did not issue, "irreparable damage and injury would accrue."

Neither in this nor any other affidavit is there a denial of the debt being due, nor any direct assertion of there being a right of set-off, although there is a reference to a claim of set-off.

There is no averment that the corporate company were not fully aware from the beginning of the acts of their authorised agents in the colony, nor that they were not approved of; and there is no averment of any fraud or misrepresentations having been practised. There is no statement that the directors acted beyond their powers in incurring the debt, or in appointing their agent here, or in the employment of the attorneys, or that the agent or the attorneys exceeded their authority in allowing judgment to be obtained.

It is contended, however, that because the corporation was not liable to be sued under Victoria, No. 6, section 17, by their agent, and because "irreparable loss and injury" would be sustained, the injunction ought to issue.

If it be clear, as I think it is, that corporations are not within that section, then two courses are open to the company, either to pay the money to the sheriff and sue for money received, *Tobbett v. Noppe* (a)—or sue the sheriff and the plaintiffs for damages for the seizure and sale of the stock and goods without legal authority.

The irreparable damage and injury could only arise by the non-payment of a debt actually due to the Waratah Company.

On the other hand, it is said that in the particular seizure the sheriff and the Waratah Company are alike trespassers, and that the Court will interpose to prevent the illegal use of legal process, even when it is made the instrument of obtaining payment of a just debt. If this were the bare fact, I might perhaps not differ so much from the views taken by my learned brothers, although even then I think it would be open to question whether the Court of Equity would interfere, at least, without taking care that the money was brought into Court, where, as in this case, there is no affidavit of merits—and the conduct of the parties applying for its interpretation have been such as is declared by the affidavits.

My judgment is indeed altogether founded upon the conduct of the plaintiff corporation: I am of opinion that they have disentitled themselves to any assistance from the Court, and that they ought to be left to their legal rights. They acknowledged the justness of the debt in July, and by their authorised agent at first put in a defence to the action in September, which was withdrawn about October 20th, if not with their express sanction, certainly by their authorised agent, and without any intimation that they intended to set up the

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illegality of the proceedings; on the contrary, by abandoning the defence, they led the Waratah Company to believe that no difficulty would be interposed in the way of their recovering their just debt, and then one month after judgment signed, and three weeks after levy made, they apply to this Court for an injunction. Had the Waratah Company been apprised at an early stage of the intended legal defence, there would have been ample time for them to have commenced another action, and obtained judgment against the corporation by its corporate name; for a Court of Equity cannot suppose that a vexatious and false defence would have been raised, when the debt was admitted to be due; nor can it be inferred there was any available set-off, since the former legal advisers of the Corporation were of opinion that it was not available; and neither they nor their present legal advisers say that it is.

The plaintiffs, therefore, having carried on business here under a name that in no way implied they were a corporation, as it omitted the important qualification "limited," and having, while admitting a just debt, slept on their legal rights and gained time by lulling their opponents into the continuance of a proceeding which is now discovered not to be warranted by the statute, I am of opinion, with all respect to the rest of the Court, that it is not the duty of the Court to interpose in that behalf, but leave them to their legal rights. Even in a court of law, an error in procedure may be easily waived. To use the words, as Lord *Brougham* says, in *Taylor v. Clemson* (a), "With respect to all defects in process, which is the foundation of a suit, I hardly know any such defect which may not be cured by the party appearing to it, and attending as if he had had his notice, and as if the process were valid."

And it does not seem to me inconsistent with the general principles of equity to enable the corporation, which was substantially sued, though not in form, now to take advantage of the mistake of their opponents, not only without any affidavit of merits, but while admitting that they have no conscientious defence: and this too, when, as it appears to me, they have by their conduct, both before and after judgment signed, practically acquiesced in their liability to the debt, and to the mode of its recovery.

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Held also, that there was sufficient evidence to support the finding of the jury in favour of the Crown.
Held, per *Wyse*, J., that the onus of bringing himself within the proviso of sec. 22 of 9 G. IV., c. 31, lay on the prisoner.
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By the 5 and 6 Vic., c. 36, the "waste lands of the Crown" were to be conveyed or alienated only in the manner and subject to the regulations prescribed by that statute. By section 3, lands required for certain specified public purposes are excepted from the operation of the Act; and section 20 reserves all existing promises and engagements made by or on behalf of Her Majesty, with respect to lands in the colony. By section 23, waste lands are defined to be "any lands which are or shall be vested in Her Majesty, &c., and which have not been already granted or lawfully contracted to be granted to any person, &c., or which have not been dedicated or set apart for some public use." *Held* that lands so granted to the corporation, did revert and become vested in the Crown on its dissolution, but did not become waste lands within the meaning of Act.

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By the New South Wales Constitution Act of 1853, section 47, all territorial, casual and other revenues of the Crown (including royalties), from whatever source arising within the colony, are made part of the consolidated revenue fund. By section 20, the civil list is declared to be granted in lieu of all territorial, casual, and other revenues of the Crown, to the disposal of which the Crown may be entitled absolutely, conditionally, or otherwise. By section 58 the management of the waste lands of the Crown, and the appropriation of the proceeds are vested in the colonial legislature, provided that nothing therein contained shall affect any promise or engagement of the Crown in respect of such lands. *Held* that the proceeds of the church and school lands do not form part of the consolidated revenue. *The Attorney General v. Eagar* 234

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trustees, *cestui que trust*, and the plaintiff jointly, their heirs, &c., that he would within a specified time complete the theatre, that he would during his tenancy allow no other entrance to it from that street, nor any entrance to the boxes except from C. street—that there should be no entrance to the pit and gallery except from the demised land, and that he should always, whenever the theatre itself should be open, keep open all the doors leading from it to the said land, and further that he would impose similar covenants as to those entrances and doors on all tenants of the theatre. There then followed covenants with the same parties, and their and his heirs, &c., to pay the rent and taxes, and to repair, &c. The plaintiff sued the defendant for breach of covenant, by not keeping open the doors which led from the strip of land to the theatre, although the theatre itself had at the time been open—but that he had closed them, so that persons going to the pit and gallery and who were accustomed to pass along the said strip of land to the great profit of the plaintiff in his business could not use that entrance. *Held*, that no action was maintainable on the covenant declared on, or any of the first set of covenants by one or more of the covenantees less than the whole—but that all of them must join. *Cunningham v. Fitzgerald* 72

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of his causing to be placed to my credit in the Commercial Bank, Sydney, at once, the amount of purchase money, £180," which was signed by the defendant. <i>Held</i> , that the only promise contained in this instrument was, that the defendant would guarantee that <i>White</i> should have a good and valid title, and should be in a position to convey; but not that <i>White</i> would execute a conveyance to the plaintiff. <i>Waterson v. Barclay.</i>	14
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4. Some bushrangers having captured K. and P., threatened to murder K., unless K. gave them £500. It was then arranged that the bushrangers should keep K. in custody till ten o'clock the following morning, when they said they would shoot him unless P. should go to R., the father-in-law of K., and obtain the money, and return with it to the bushrangers before that time. P. went with Mrs. K. to R., who obtained the money, and gave it to P., and P. then went to the place where K. was in custody. The bushrangers having asked P. whether he had the money, he said "yes," and threw it to one of the bushrangers who put it in his pocket; the bushrangers then rode away, leaving both K. and P. at liberty. <i>Held</i> that the offence was certainly larceny, if not robbery, as against P. <i>Semble</i> , it was also larceny as against R. <i>Reg. v. Cheshire</i>	129
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6. On the trial of an information for larceny of a horse, it appeared that the prisoner was driving a mob of horses, when the horse in question, a distinctly branded one, joined the others—it being near the owner's run. It did not appear whether the prisoner who was riding 200 or 300 yards behind, and having assistants a-head or at the side) saw at the time that this horse had joined his own horses. But the prisoner the next morning, counted over (as his custom was) the horses, and then drove the whole on together to their destination. The Judge refused to tell the jury that assuming this to be a case of finding, if, when the prisoner first saw the horse with his mob, he did not form the design of conversion, he was not guilty of larceny; but he told them that if in such case, when the prisoner first did some act or gave some direction by which he treated the horse as part of his mob, or incorporated it therewith, he did not form such design, he was not guilty of larceny. The jury found that it was a case of finding, and convicted the prisoner. *Held* that the direction was right. *Reg. v. Finlayson* 301

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NUISANCE. 1. In an action by the owner of land adjoining a public road, for damage done to that land by an overflow caused by the unskillful cutting of a drain in the road, it appeared that the defendants employed a person to cut the drain, directing him to make a sufficient drain so as to carry off the water, and paid him a stipulated price per yard; and he employed and paid men under him who did the work. The person thus employed by the defendants, in the wrong exercise of his judgment, stopped short of the due level, and so caused the overflow. *Held*, that the defendants were responsible for the injury, although they were acting gratuitously on behalf of the public or government, and expending within their district money voted for this work, and although the work in question so undertaken for the public benefit was paid for out of this money.

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The first count was for breach of duty, and alleged that the defendant had sued out a writ of *f. fa.* against A., and that the writ was delivered to S., to be executed by him as special bailiff under 7 Vic., No. 13, and that the special bailiff, under colour of the writ, seized and sold the goods of A. and B., and delivered them to the purchasers, and also sold them under their value, and also seized and sold more than was necessary to satisfy the writ. The second count was for money had and received.

The defendant pleaded not guilty and not possessed to the first count, and never indebted to the common count, except as to £157 6s. 10d. - and as to that amount, paid that amount into Court. The plaintiff joined issue on the first three pleas, and replied to the fourth plea, taking £157 6s. 10d. out of Court in discharge of the causes of action to which it was paid in. *Held*, that by taking out of Court the money paid in under the money count, the plaintiff waived the tort, and could not, therefore, recover on the first count. *Smith and another v. Ogg* 6

PERJURY. 1. In a trial for perjury, alleged to have been committed in a case where the prisoner (as a member of a company) was sued by one *Berryman*, under the Masters and Servants Act, for wages accrued due since the preceding April, the prisoner swore he never was a member of the company in question. *Held*, that the evidence was material, and that perjury could be assigned upon it.

It was proved there was a written complaint and summons, but neither were produced; but a minute book which contained an entry — “*Berryman v. Cohen*, Wages. Plea, never indebted” — and also the whole of the depositions of the witnesses signed by them, and the sentence of the justice signed by him, was received in evidence to show that there was a case pending, over which the justices had jurisdiction. *Held* that the evidence was properly admitted. *Reg. v. Cohen* 348

PETITION OF RIGHT. 1. In a petition of right, it was stated that the suppliant was an informer and prosecutor, under the Scab Act, against S., for a breach of the 14th section, and that S. was convicted and fined by two justices, and that the justices directed the whole of the fine to be paid to the clerk of Petty Sessions—he being the clerk of the division in which the justices usually acted; and also ordered, in pursuance of the 16 Vic., No. 1, s. 15, such clerk to pay a moiety of the fine so to be received to the suppliant, as being entitled to the same under the statute; but that the clerk had refused to do so. The suppliant then stated, that afterwards the Government remitted the whole fine on certain equitable grounds; but that in the meantime the clerk embezzled the money, and it had never been paid over

to any body; and prayed that he might be enabled to recover from the Crown itself the amount of the moiety of the fine, as money received by the Crown to the use of the suppliant. *Held*, on demurrer, that the plaintiff was entitled to a moiety of the fine, under the 1st Vic. No. 1, s. 15, but that the Crown was not responsible. *Quere*, whether the order of the justices was correct. *Reg. v. Tupholme* 341

PLEADING. 1. Action on an agreement in writing between the plaintiff, defendant, and S., whereby the plaintiff agreed to let certain land to S., and defendant became surety with the plaintiff for the due performance of all the "covenants and agreements on the part of S., and for the payment of rent." Breach, non-payment of rent in arrear by S. or by the defendant. Plea, on equitable grounds, that before the making the agreement it was agreed between the plaintiff and defendant and S., that the plaintiff should execute a lease under seal of the premises to S., and that the same should contain the covenants in the agreement, and that S. should execute the lease containing such covenants, and that the defendant's liability to the plaintiff should be for the performance of such covenants by S.; and that the defendant signed the agreement on the faith and on the condition that such lease and covenants should be executed by plaintiff and S. Averment, that no lease under seal was ever executed by the plaintiff or S., or any lease or covenants whatever. *Held* that the plea was an answer to the action. *Sullivan v. Willson* 180

2. Trespass, *quare clausum fregit*. Plea, not possessed. Replication, under the 28th section of the Crown Lands' Occupation Act of 1861, that on the 18th December, 1850, G. B. being then an agent of the Crown, in that behalf lawfully authorised, did promise, engage, and contract with J. S. A. for the granting to him, under the Orders in Council referred to in the Lands Occupation Act of 1861, for a term which at the time of the trespasses was, and still is, unexpired, of a lease of the *locus in quo*—and the said J. S. A. entered into the possession of the said land; and after such entry—and during the said term—the plaintiff purchased from the said J. S. A. all his right, title, and interest in the said land, and the same was with the sanction of the government duly transferred to the plaintiff by a document dated 13th November, 1851, under the hand of the said G. B., then being such duly authorised agent as aforesaid—and the plaintiff entered into possession of the land in such transfer mentioned. *Held* bad, on demurrer, for not alleging that the land was Crown land, of which there was no lease in force. *Richards v. Whitford* 294

3. The first count of the declaration set out a contract for the sale of 4,000 sheep, to be delivered by the defendant, and paid for by two promissory notes of the plaintiff in favor of the defendant. Averment of the fulfilment of all conditions precedent. Breach, non-delivery. The second count set out the same contract. Breach, that although the plaintiff made and delivered to the defendant the two promissory notes in accordance with the agreement, and although the defendant delivered to the plaintiff part, to wit, 3,000 of the sheep, yet the defendant did not deliver the rest of the sheep. The third count was in the same terms as the second, with the additional averment that after the defendant had so delivered to the plaintiff the said part of the sheep, he took the same away from and out of the possession of the plaintiff, and resumed the possession thereof, and disposed of the same to his own use, and refused to allow the plaintiff to take away the same. Plea, that the agreement

was a contract for the sale of goods, for the price of £10 and upwards, and that the plaintiff did not accept any part of the goods so sold, and actually receive the same, nor did he give anything in earnest to bind the bargain or in part payment, nor was any note or memorandum in writing of the bargain made and signed by the defendant or his agent thereunto lawfully authorised. *Held* a good answer to all the counts.

Semble, that a plea pleaded to two different counts, but an answer to one count only, is not bad altogether, and on demurrer can be taken distributively. *Cummings v. Clifford* 185
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 In reserved criminal cases, only one counsel will be heard on either side. *Reg. v. Packer* 40

PRACTICE. 1. Motions for new trials are not within Rule 6, of February 28, 1856, and therefore affidavits may be used in showing cause, although there has not been the notice or service required by that rule. *Jones v. Gorman* 32

2. An interpleader order had been obtained directing the trial of various issues between A. and B., as to the ownership of certain goods in the possession of B., and over which B. claimed a lien, but upon which A. had levied, and directing that A. should proceed to trial of his action at the earliest available day. B. retained possession of the goods, but gave a bond conditioned to pay their value, or the amount of A.'s demand on them, in case A. obtained a verdict. It being found that due diligence had not been used by A. to bring the cause to trial, the Court, on the application of B., ordered the bond to be delivered up to be cancelled, and A. barred from prosecuting the action. *Lery v. Mollison and another* 81
3. Application to amend rule *nisi* for a new trial should be immediately after service of the rule. *Zimmer v. Manning* 323
4. Where the writ of summons stated that it was issued in an action at the suit of (naming the plaintiffs), as directors of the M. and N. M. C. Co., and the declaration was in their own right, the declaration was ordered to be amended so as to correspond with the summons. *Thorn v. Berriman* 124
5. An application under the third section of the Real Estate of Intestates Distribution Act of 1862, may be by petition and in a summary way, and without the necessity of a suit for the administration of the estate. *In re Carvell* 354
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2. In a case where jurisdiction is conferred on two magistrates, it appeared that A. was convicted by two magistrates, but the second magistrate was not present when the evidence was given, and he merely considered it as it appeared on the depositions, in conference with the other adjudicating magistrate. *Held* that the conviction was wrong, following *R. v. Marrington*. *Ex parte Ryan* 221

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2. An application to have lands brought under the operation of the Real Property Act of 1862, must be entertained by the Registrar General, although it appears by the terms of the application that the lands in question are, as a matter of fact, occupied by some person who does not claim in any way to be there under the applicant. *Ex parte Hamilton* 311

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SHIPPING. 1. S. mortgages a ship to M., and afterwards to P.; both these mortgages were registered. M., under section 71 of the Merchant Shipping Act, sells to C., but before this conveyance is registered, P. applies to the Court and obtains a suspending order under section 65, and by his petition asks for liberty to sell the ship under the power of sale vested in him as such mortgagee, under section 71, on paying M. the amount due to him. <i>Held</i> , that assuming the Court had jurisdiction, the right of C. as against M. was an equity within the meaning of the 3rd section of the 25 and 26 Vic., c. 63, and that therefore the Court ought not to interfere. <i>In the matter of the mortgages of the ships "Albion," "Myrtle," and "George"</i>	138
SLANDER. 1. Action for slanderous words. The first count of the declaration alleged that the defendant spoke of the	

plaintiff, "You are a false-swearer old vagabond, you robbed me, and you will rob everybody you have to do with; you will rob that man (meaning G. B. K.) before you have done with him." A second count alleged that defendant said of the plaintiff, "You are a false swearer and swindler; you swindled me, and you will swindle them too (pointing to G. B. K., and meaning G. B. K. and his brother).

The plea to the first count stated that the plaintiff induced the defendant to lend him his name to a promissory note, on the fraudulent representation that the plaintiff had goods in a yard which were unencumbered, whereas the goods were then under mortgage, as the plaintiff knew, and that the plaintiff was insolvent; and that the result was that the defendant had to pay the promissory note and lost his money.

The plea to the second count, after setting out the same facts as were set out in the first plea, stated that in an examination before the Chief Commissioner of Insolvent Estates, the plaintiff committed perjury. Both pleas contained the allegation that the plaintiff was about to have business transactions with G. B. K., and that by reason of the facts stated in the plea, it was for the public benefit that the words complained of should be spoken. *Held*, no sufficient justification, under the Injuries to Character Act, 11 Vic., No. 13, sec. 4. *McIsaac v. Robertson* 51

SQUATTING ACTION, what amounts to a promise under the 28th section of the Crown Lands Occupation Act. *Richards v. Whitford* 110
See CROWN LANDS OCCUPATION ACT or 1861, 1.
pleading a promise under the 28th section of the Crown Lands Occupation Act. *Richards v. Whitford* 294
See PLEADING, 2.

SURETY.

See PLEADING, 1. *Sullivan v. Wilson* 180

SURRENDER by act and operation of law.

See MORTGAGE, 1. *Mate v. Kidd* 196

TAXATION.

See COSTS.

TENANCY IN COMMON. 1. The plaintiff and the defendant were tenants in common of some land, about sixteen acres; the former being entitled to one, and the latter to two, undivided thirds, and this land was let to B. A partition took place, and afterwards there being no change in the occupation, but all the parties knowing there had been a change in the ownership, and that the plaintiff had seven acres, and the defendant nine acres exclusively under the partition, the defendant continued to receive the rent of the whole. *Held* that the plaintiff could not receive from the defendant, one-third of the rents thus received in an action for money had and received. *Peacock v. Hasson* 191

TRESPASS. 1. Where a writ of *h. f.* is sued out by an attorney and directed to a special bailiff under 7 Vic., No. 13, sec. 2, the client is responsible for acts done by the bailiff, in respect of or by color of the process; and he is equally liable if the attorney is employed by some one on his behalf without his knowledge, and he afterwards ratifies the employment. *Matthews v. Ogg* 1

2. A. and B. were jointly interested in a station, but the cattle running on it were their separate property; each of them had his own distinct herd and stockyard, with different brands and stockmen, but the separate herds intermixed habitually on the joint land, and ran together

Held that A. and B. were not jointly liable for the trespasses of their respective cattle. *Osborne v. Budd* 291 replication of promise under the 28th section of the Crown Lands Occupation Act, to plea of not possessed in an action of, *Richards v. Whitford* 294
 See CROWN LANDS OCCUPATION ACT OF 1861, 1. *Richards v. Whitford* 110
 See RESERVATION, 1. *Campbell v. Dent* 58

TROVER. 1. A person entrusted with the duty of delivering sheep at a place specified, and to whom the animals are given over for that purpose, with the power of hiring servants under him, has a possession and sufficient property in the sheep to enable him to maintain trover as against a wrong doer.

The plaintiff was employed to drive 6000 sheep belonging to A. and B., a distance of 150 miles, and paid a weekly salary but was not responsible for losses on the journey. He had power to hire as many servants as should be necessary, at his discretion, during the journey, but at the expense of A. and B., and he was to procure provisions for the men, and for his horse, as they travelled. In the course of the journey, about 1500 of the sheep got astray in a scrub, near a station of the defendant, and the plaintiff being unable to discover them, proceeded with the remainder to the end of his journey and then ascertained the large number missing. The plaintiff thereupon went back, and found some hundreds of the sheep on the run of the defendant, which had been remarked and clipped since the loss. The defendant claimed them as his own, relying as he said, on his overseer's knowledge of them. Some, however, were delivered up, and an action of trover was brought for the remainder. *Held* (*Stephen, C. J., dubitante*) that the plaintiff could maintain the action.

Held also, that in such action the measure of the damages should be the full value of all the sheep when converted, subject to a reduction by the value of those returned, when they were returned. *Bennett v. Flood* 158

2. G. gave a bill of sale over certain goods to the defendant. The plaintiff, in ignorance of this mortgage, purchased these goods from G., took possession of them, and having sold a portion, removed the residue, together with other goods subsequently acquired, to another place of business. The plaintiff then assigned the whole property to L. The defendant being unable to enforce his own mortgage personally, employed an agent to do so, and the latter placed the matter in the hands of a solicitor. Under the instructions of the latter (he throughout equally representing L.), the plaintiff's house was entered, and all the goods indiscriminately, which were included in both securities, were seized and sold; the sale being certainly effected, if not announced to be, for both. It was proved that the bailiff seized all the goods at the same time, under each bill of sale; and that the proceeds, after deducting the expenses and the amount due to L., were remitted to and received by the defendant. In an action of trespass for this illegal entry on the house, and trover for this seizure and sale, the defendant pleaded not guilty and not possessed. *Held* that the defendant was liable for such entry, and for the intrusion by his agent up to the day of sale. *Held* also (*Wise, J., dissentiente*), that under these circumstances the defendant must be presumed to have seized and to be responsible for those goods only which were included in the mortgage to

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himself; and as the jury had given damages as for the seizure and conversion by the defendant of all L.'s goods, a new trial was granted. <i>Zimmer v. Manning</i>	319
TRUST.	
See CHURCH AND SCHOOL LANDS, 1. The Attorney-General v. Eagar	284
WAIVER of tort, by taking money paid into Court. <i>Smith v. Ogg</i>	6

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AFFIDAVIT, IRREGULAR. Motion to set aside attachment obtained <i>ex parte</i> on an irregular affidavit, dismissed, as affidavit still on the file. <i>Whyte v. Browne</i>	21
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DISCOVERY. In suit by purchaser from J. J., deceased, against the trustees of his will, relating to the land purchased. <i>Held</i> , that the late solicitor of J. J., and the present solicitor of the trustees, were bound to inform the trustees of the deeds in their respective possession, relating to the said lands, and that the trustees were bound to enquire of them and make discovery thereof to the plaintiff. <i>Battray v. Blanchard</i>	1
EXCEPTIONS TO MASTER'S REPORT. Form of exceptions to Master's Report framed on the precedent of <i>Freeman v. Fairlee</i> , allowed where there had been no application to take them off the file. <i>Rodd v. Hickey</i>	6
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INJUNCTION. 1. Injunction to restrain principal from suing surety on certain promissory notes, on the ground that the collateral securities had been destroyed. <i>Healy v. Cornish</i>	28
2. Injunction granted to restrain creditor whose debt was secured by certain promissory notes and a mortgage, from	

suing upon one of the notes, on the ground that he had assigned the mortgage, and was not in a position to reconvey the mortgaged property. *Jones v. Waller* 34

8. A. brought an action (under Absent Defendant's Act) against B., as the agent of a mining company, called C., and issued execution upon the plant, &c., of a corporation, called C. (limited). A had intended to sue C. (limited), and there was no dispute that the debt was due by it. *Held*, that the action was not against C. (limited), and the debt did not justify the seizure. Injunction granted to restrain the sale. *The Melbourne and Newcastle Minmi Colliery Company v. McLean* 105

LACHES.

See SPECIFIC PERFORMANCE, 2.

LEGAL ESTATE. Trustees of will take legal estate by implication, where such estate necessary for the performance of the duties imposed on them. The circumstance of there being a gift of the estate to the person beneficially interested, not sufficient to prevent this implication arising. *Bitche v. Price* 14

LIQUIDATOR, DUTIES OF. A. and B. being embarrassed, dissolved partnership, and appointed C. to wind up their affairs in liquidation and pay the debts as they fell due. C. paid some of the debts in full, and some he did not pay at all. Ultimately the estate of A. and B. was sequestrated, and D., the official assignee, filed his bill against C. for an account and charging that he ought to have paid the debts rateably. *Held* that D. did not represent the creditors, but only A. and B.

Held, that under his instructions, C. was not bound to pay rateably.

If estate insolvent, liquidator (without special instructions) bound to pay rateably. If solvent, he may pay as the debts fall due in full. If doubtful whether solvent, he is bound to pay rateably. *Sempill v. Campbell* 91

MORTGAGEE.

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MULTIFARIOUSNESS.

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OFFICIAL ASSIGNEE.

See LIQUIDATOR.

PLEA DOUBLE. In negative pleas to which answer is required, the rule is, that the defendant must answer all the circumstances which lead up to the equity alleged in the Bill, and denied in plea, but must not deny by answer the equity itself relied on. Plea, that defendant claimed no interest in the deeds, &c., in the Bill mentioned, and that any knowledge or possession of the same in him was acquired as attorney of J. J. *Held* bad, as being double—amendment of plea refused. Plea to stand as part of the answer, with liberty to except. *Rattray v. Blanchard* 81

PLEA, NEGATIVE.

See PLEA, DOUBLE.

REDEMPTION. Bill for Redemption charged that the consideration in the deeds was not paid at the execution of the deeds, nor so large a sum ever paid; and prayed, beside usual accounts, an account of all monies paid by the defendant. Answer set up special agreements as to the consideration to be inserted in the deeds. *Held* that agreements were proved, and could not be set aside in this suit.

REPRESENTATION OF CREDITORS.

See LIQUIDATOR.

SOLICITOR.

See DISCOVERY.

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SPECIFIC PERFORMANCE. 1. In suit for specific performance, defendant claimed compensation, as having been misled by plaintiff's misdescription. *Held*, that as defendant had the opportunity to verify the description, he could not claim compensation; but as the difficulty arose from plaintiff's misdescription, each party should bear their own costs. *Talbott v. Cunningham* 8, 67

2. Specific performance of contract concluded in 1831, and confirmed in 1841, Bill being filed in 1847, refused on the ground of Laches. Confirmed on appeal (*dissentiente*, Ch. J.), but under the circumstances without costs of the Court below, or appeal. *Berry v. Elyard* 67

STATUTE OF LIMITATIONS.

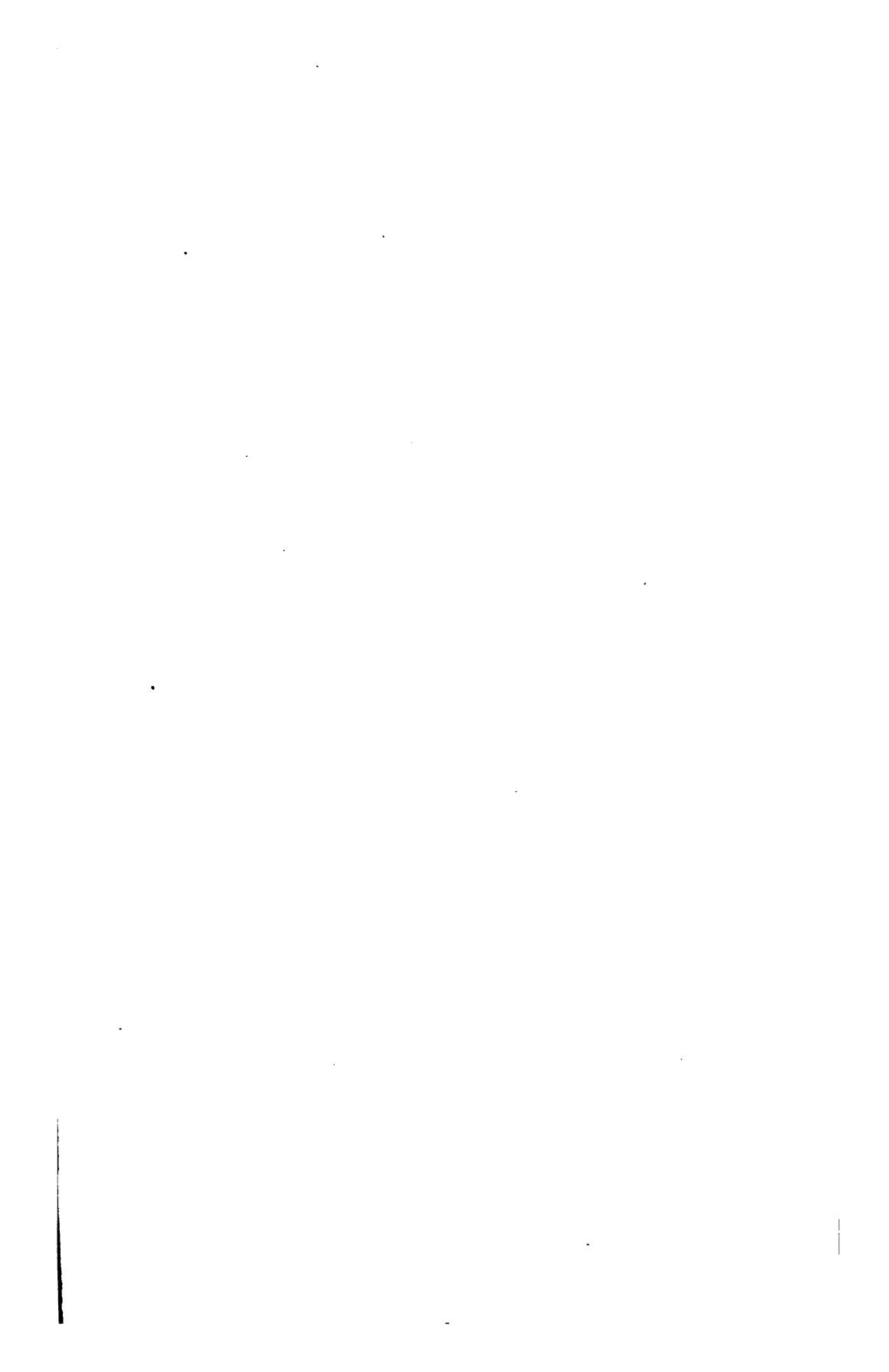
See TRUST, BREACH OF.

TRUST, BREACH OF. W., M., and T., being trustees of C.'s will; W. and M. left the colony, and appointed E., by power of attorney, to act for them; money belonging to the trust estate was received by Messrs. G., J., and R., the solicitors of the estate (J. being also trustee), and paid out on cheques of the firm, and applied by J. with cognizance of E., in manner contrary to the trusts. J. and E. being insolvent, W. and M. filed their bill against G. and R. *Held*, that defendants in this suit were not liable for the breach of trust. *Held*, that Statute of Limitations had barred any claim against defendants as agents. *Wentworth v. Gurner* 22

TRUSTEE.

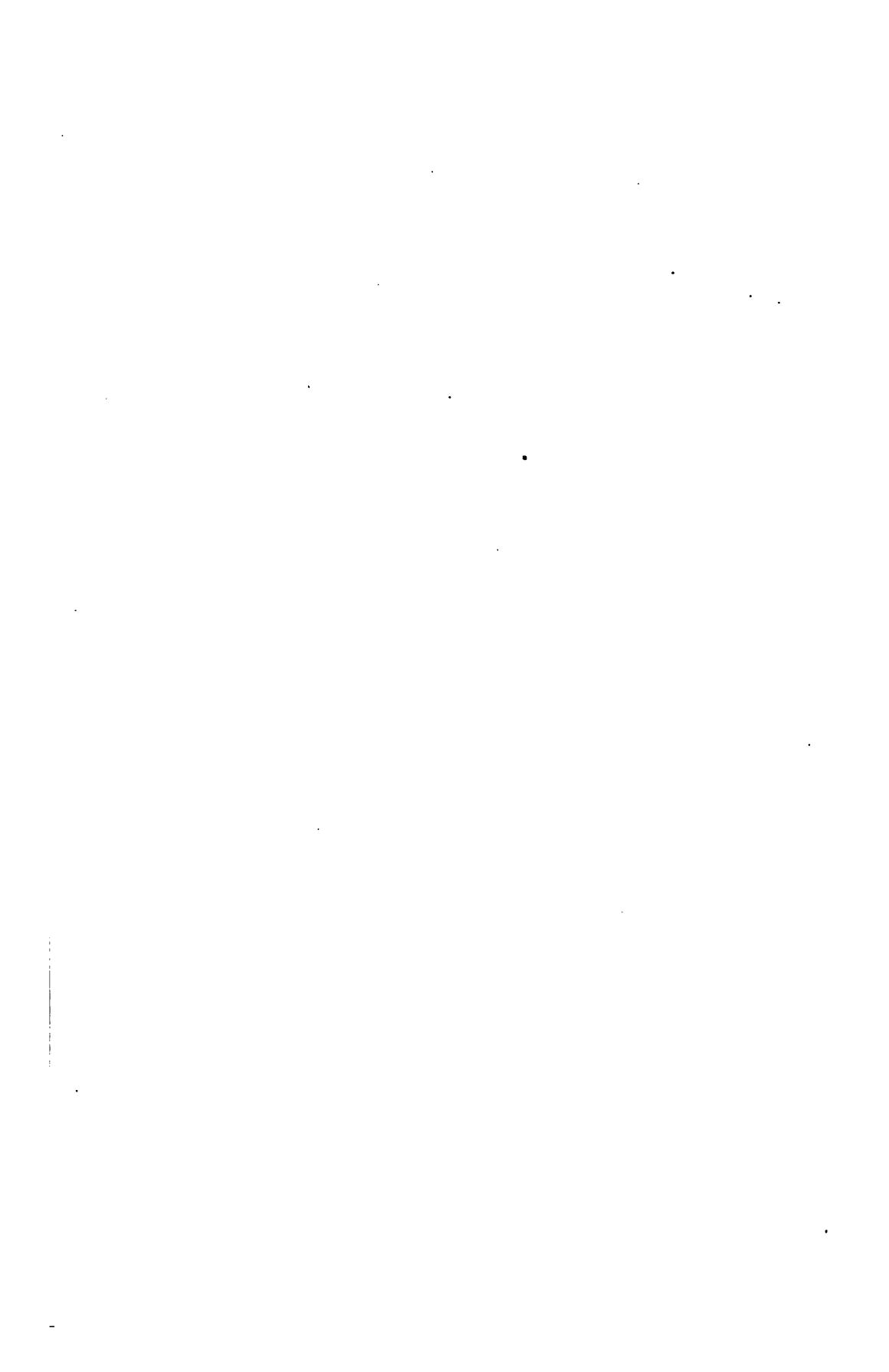
See LEGAL ESTATE.

VESTING ORDER. Vesting order made by consent where Crown represents estate of heir-at-law of intestate, who was out of the jurisdiction. *Glascock v. Foreman* 64









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